

1961

Grant Shaw and Ila Shaw, Husband and Wife v. Rue Abraham and Gloria Abraham, Husband and Wife, Mary J. Abraham, Ben Noyce and Gaddis Investment Company, A Utah Corporation and Mary J. Abraham v. Rue Abraham and Gloria Abraham, Husband and Wife, and Grant Shaw and Ila Shaw, Husband and Wife : Brief of Respondents

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IN THE SUPREME COURT
of the
STATE OF UTAH

FRANK SHAW and ILA SHAW,
husband and wife,

Plaintiffs and Respondents

—VS.—

ABRAHAM and GLORIA ABRAHAM,
husband and wife, and **MAE ABRAHAM,**
ABRAHAM, BEN BOYCE and
INVESTMENT COMPANY
Corporation,

Defendants and Appellants

A N D

MARY J. ABRAHAM,

Plaintiffs and Respondents

—VS.—

ABRAHAM and GLORIA ABRAHAM,
husband and wife, and **FRANK SHAW and ILA MAE SHAW,**
husband and wife,

Defendants and Appellants

BRIEF OF RESPONDENTS

KING AND HUBBARD
Counsel for Plaintiffs

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husband and wife,
Plaintiffs and Respondents

—vs.—

RUE ABRAHAM and GLORIA ABRAHAM,
husband and wife, and MARY J.
ABRAHAM, BEN BOYCE and GADDIS
INVESTMENT COMPANY, a
Utah Corporation,

Defendants and Appellants
A N D

MARY J. ABRAHAM,

Plaintiffs and Respondents

—vs.—

RUE ABRAHAM and GLORIA ABRAHAM,
husband and wife, and GRANT
SHAW and ILA MAE SHAW, husband
and wife,

Defendants and Appellants

Case
No. 9421

KING AND HUGHES

Counsel for Plaintiffs and Respondents.

BRIEF OF RESPONDENTS

PRELIMINARY STATEMENT

The parties will be referred to throughout the Brief
by their names or as plaintiffs and defendants.

All page numbers referred to are from the Reporter's transcript of testimony.

All Italics are ours.

STATEMENT OF FACTS

Plaintiffs cannot agree with either of the statements made by the defendants, and will, therefore, restate the facts as plaintiffs view them, and on which the Findings, Conclusions and Decree of the Honorable John L. Sery, Jr. were based.

The appeals of the defendants are made from a Judgment on the merits in favor of plaintiffs and against defendants.

All Statement of Facts herein contained will be based on the evidence in the light which gives the Court's Findings support.

Plaintiffs are persons of very limited educational background and with no prior experience in selling or handling real estate. They do not have the background necessary to understand the various complicated and misphrasing of contracts and legal documents. Because of their inexperience and lack of understanding, they employed the defendants, Gaddis Investment Company, and Ben Boyce, to handle on their behalf the sale of their property to the defendant, Rue Abraham and Gloria Abraham, his wife.

The listing Card taken by the Real Estate Firm appears to be dated December 8, 1958. See Exhibit "B".

At the time the listing was given plaintiffs informed the Investment Company and Boyce that they had discussed the possibility of sale with the defendant, Rue Abraham. As a consequence, if a transaction was consummated with Abraham, the full commission of 7% would not be paid but only the sum of \$300.00.

After the 9th of December, 1958, Boyce, representing the plaintiffs contacted Rue Abraham in Richfield, Utah, and discussed with him the possibilities of selling plaintiffs' home and acreage near Sigurd, Utah.

Plaintiffs owned a three-bedroom home, 65 shares of water in the Piute Irrigation Company and 49 acres of ground. A portion of the water stock and land was subject to obligations owing to the estate of Grant Shaw's father, and the Federal Land Bank.

The listing price was \$24,000.00 but plaintiffs had informed Abraham that they would accept \$22,000.00 from him if he purchased the property.

Shaw had discussed the sale with Abraham prior to the time that he employed Gaddis Investment Company, but no definite agreement on the exact terms was ever arrived at between Shaw and Abraham. (P. 254), (P. 90).

Boyce contacted Abraham. As result of their discussion a preliminary Earnest Money Receipt and Offer to Purchase was prepared, dated December 9th, 1958. It is Exhibit "A". This Exhibit was signed by Grant and Ila Shaw, and was delivered by Boyce to Abraham. Abraham would not sign the Earnest Money Receipt and

Offer to Purchase but took it home with him to discuss with his wife. He, thereafter, forwarded to Gaddis Investment Company Exhibit "B" which is a different form of Earnest Money Receipt and Offer to Purchase.

Boyce ultimately prepared a Uniform Real Estate Contract with an attached Agreement, together with an Assignment of Contract which he presented to the Shaws and which they signed.

During the discussion between Boyce and Abraham, Abraham told Boyce that he intended to mortgage the home of the plaintiffs and their water stock to obtain the down payment of \$10,000.00 which was recited in the Agreement. (P. 158, P. 171). Abraham never did tell Boyce that he intended to sell the water stock to obtain the down payment. (P. 105, P. 151, P. 170). Boyce always believed that what Abraham intended to do was borrow \$5,000.00 on the water stock, and \$5850.00 on the home. (P. 188). The original Earnest Money Receipt and Offer to Purchase signed by the Shaws was subject to the Abrahams being able to borrow \$10,000.00 on the Shaw home and water stock. (See Ex. "A"). When Abraham prepared the Earnest Money Receipt and Offer to Purchase, which is Exhibit "B", he changed the word "Borrow" to "Secure". Exhibit "B" was never signed by the plaintiffs. The Earnest Money Receipt and Offer to Purchase, the Agreement and the Assignment, the documents which were ultimately executed by the parties, were all drawn by the defendant, Boyce, and the language used is his language, with the exception of an insertion which was placed, Boyce says, in said documents by

Abraham and was placed by Boyce, according to Abraham, on the document.

The language that is in dispute, on the Exhibit 1, reads as follows:

“It is also agreed that there shall be no deficiency of any nature against the Buyers.”

In the Agreement, the language reads “or a deficiency of any nature.” These two phrases were added after the documents were prepared. They are initialed by Rue Abraham and Grant Shaw. Both Boyce and Abraham deny that they placed the particular language in the Agreement. No portion of the Agreement was prepared by Shaw.

At the time Boyce presented the various documents to Shaw for his signature, and the water stock to be endorsed, Shaw told Boyce that he wanted the water stock fixed so that it could not be sold and he would have a right to redeem the stock if the payments were not made on the contract. (P. 242). Shaw understood that the water stock and home were to be used to borrow and pledged for the down payment. (P. 265).

At no time did anyone ever tell Shaw that the water stock could be sold under the arrangement which Boyce had set up. (P. 243).

Shaw endorsed the stock certificates in blank and delivered them to Boyce. (P. 250).

Boyce, without obtaining any money whatsoever, other than the \$100.00 Earnest Money payment, delivered

the endorsed certificates to Abraham. Abraham took them immediately to the Vermillion Irrigation Company and sold the certificates and received therefor \$10,075.00 and out of said sum \$9,900.00 was paid to the plaintiffs or their creditors. (Pgs. 102, 103 and 105).

The documents are all dated December 22nd, 1958, and required payments, within thirty days of occupancy, of \$1,000.00 on the unpaid balance of \$12,000.00 and \$90.00 per month. (See Exhibit 1).

On December 22, 1958, defendants, Rue and Gloria Abraham, executed a mortgage covering the home of plaintiffs in the Sigurd Township for \$5,850.00 and delivered it and a promissory note to Mary Abraham, the mother of the defendant, Rue Abraham. No consideration for this mortgage was paid at the time of its delivery. It was given, according to the testimony of defendants, Rue Abraham and Mary Abraham, to pay and secure advancements made to Rue Abraham over a period of nine to eleven years prior to the 22nd of December, 1958. (P. 174).

Abraham made no payments whatsoever on the balance owing to plaintiffs. Nor did he pay any sum whatsoever on the mortgage owing to Mary Abraham, which required the payment of \$850.00 on or before January 22nd, 1959, and \$90.00 per month thereafter.

Mary Abraham immediately commenced a foreclosure proceedings to foreclose her mortgage on the home of the plaintiffs which had been transferred to Abraham under the terms of the Agreement, Exhibit 1. That case

became Mary J. Abraham vs. Rue Abraham and Gloria Abraham, husband and wife, and Grant Shaw and Ila Shaw, husband and wife, Civil Case No. 5039, and was joined with and tried at the same time as the principal case of Shaw vs. Abraham and Gaddis Investment Company.

Exhibits 4, 5 and 9 are letters written by Abraham to Shaw notifying him that the payments on the contract would not be made and that defendants would not go forward with the purchase of the property. Shaw filed his complaint on the 2nd of March, 1959. He commenced an action to rescind the Contract and obtain back the property which had been delivered to Abraham to have the Mary J. Abraham mortgage adjudged to be fraudulent and removed from the property and to obtain damages against Gaddis Investment Company and Ben Boyce.

Subsequently, on June 29th, 1959, plaintiffs served an Amendment to their complaint, setting forth the Fourth Cause of Action. It alleges that the original contract was obtained by fraud on the part of Rue Abraham, and setting forth the basic propositions which were shown by the evidence to have occurred. Namely, that Rue Abraham represented to Boyce and Shaw that he intended to borrow money on the water stock and home to obtain the down payment, when, as a matter of fact, no such intention existed. That he intended to sell and dispose of the water stock to obtain the down payment. The amendment also contained allegations that the defendant, Rue Abraham, had no intentions of going

forward with the contract which he executed with plaintiffs and that said documents were for the purpose of fraudulently obtaining the assets of the plaintiffs without paying for them.

Trial was before the Honorable John L. Sevy, Jr. on the 23rd of June, 1959. Motions for Summary Judgment were made by the defendant Abraham which were denied. Thereafter, the plaintiffs proceeded with their proof and presented for the Court's consideration their witness, Rue Abraham. His testimony revealed the basic premise on which the amendment to the complaint was based. He told of the sale of the water stock, of placing the mortgage on the property of plaintiffs to secure an antecedent obligation. His failure to make any effort, or to have any real intentions or complying with, and performing the contract between himself and the Shaws.

Morris Nielsen testified that the total value of the Shaw property, considered as a unit with the water stock and home, attached and used in conjunction with the farm land, was \$21,140.00. The water stock had a separate value of \$11,700.00. The farm with the water on it and used with the water stock, was valued at \$13,140.00. The home separated from the farm land with water on it, he valued at \$5,000.00. The land, without water, under Nielsen's testimony had a reasonable value of \$1440.00.

The Court awarded judgment against the defendants, Rue Abraham and Gloria Abraham, for the sum of \$5,000.00, against the defendant Boyce, and Gaddis Investment Company, for the sum of \$4,250.00 and awarded judgment for exemplary damages against Rue

Abraham for the sum of \$1,000.00, with the provision that any sum paid by Abraham on the Judgment against him would be credited against the amount of the Judgment awarded against Gaddis Investment Company and Ben Boyce.

The Findings of Fact, as amended, contain Findings that the defendant, Rue Abraham, had no intention of performing and paying the agreed price to the plaintiffs for the premises of plaintiffs. That Rue Abraham represented to Boyce that he desired title to the home of the plaintiffs and to the 65 shares of Piute Reservoir and Irrigation Company stock for the purpose of borrowing the down payment. That at the time he made said representation he knew that he intended to sell the stock to obtain the money for the down payment. The Court found also that the Mortgage for \$5,850.00 given by Rue Abraham to Mary J. Abraham was in no way necessary to the transaction between the plaintiffs and the Abrahams, and that the conduct on the part of Abraham was intended to deceive, and did deceive, both the defendant, Boyce, and the plaintiffs. That the contract itself was a part of a scheme and device to deprive Grant Shaw and Ila Shaw of their property without paying for the same and was willfully malicious and intentionally fraudulent on the part of Rue Abraham.

The Court also found that the defendant, Gaddis Investment Company, by and through its real estate salesman, Ben Boyce, was negligent and failed to exercise the degree of care and skill ordinarily possessed by real estate salesmen when he delivered the water stock

owned by the plaintiffs to the defendant, Rue Abraham, without receiving the down payment required under the terms of the various documents and when he failed to appreciate and advise plaintiffs concerning the significance of the language of some of the instruments which he prepared. Said conduct on his part caused the plaintiffs to suffer damages in the amount of \$4,250.00.

SUMMARY OF ARGUMENT

POINT I

PLAINTIFFS' MOTION TO AMEND THE COMPLAINT TO CONFORM TO THE PROOF WAS PROPERLY GRANTED.

POINT II

CLEAR AND CONVINCING EVIDENCE SHOWS FRAUD ON THE PART OF RUE ABRAHAM ON WHICH PLAINTIFFS RELIED.

POINT III

SUBSTANTIAL EVIDENCE SHOWS NEGLIGENCE ON THE PART OF GADDIS INVESTMENT COMPANY AND BEN BOYCE WHICH CAUSED DAMAGE TO PLAINTIFFS.

POINT IV

SUBSTANTIAL EVIDENCE ESTABLISHED THE DAMAGE OF PLAINTIFFS IN THE SUM OF \$5,000.00 GENERAL DAMAGES.

ARGUMENT

POINT I

PLAINTIFFS' MOTION TO AMEND THE
COMPLAINT TO CONFORM TO THE PROOF
WAS PROPERLY GRANTED.

Defendant Abraham complained of the Court's granting the plaintiff permission to amend the complaint to set up the Fourth Cause of Action after the evidence had been presented to the Court.

Plaintiffs' original complaint in the Second Cause of Action alleged that the mortgage given by Rue Abraham and Gloria Abraham to the defendant, Mary J. Abraham, was given without consideration and was a part of a general plan, scheme and device to defraud the plaintiffs out of their interest in the real property and their water stock. See: Second Cause of Action, plaintiffs' original complaint, paragraph 4.

At the time of the trial it was revealed by defendant, Rue Abraham's own testimony, given in plaintiffs' main case, that not only was the mortgage which he and his wife gave to Mary J. Abraham without consideration, that he had no possible way in which he could make the payments called for in the contract, nor the payments which were called for in the mortgage.

He also testified on this direct examination that he had never told Boyce, or Shaw, that he intended to sell the water stock to obtain the \$10,000.00 down payment. (P. 105, 153). His direct testimony also revealed that the water stock was delivered to him without his having made any down payment. (P. 105).

The testimony of both Boyce and Shaw established beyond possibility of refutation and clearly that Abraham, during the negotiations told both men that he intended to raise the money by mortgaging the home of plaintiffs for \$5800.00 and mortgaging the water stock for \$5,000.00. (P. 171, P. 170, P. 172, P. 188, P. 220, P. 221, P. 222).

The original Earnest Money Receipt and Offer to Purchase, Exhibit "A", states that Buyers would be able to borrow the \$10,000.00 on the Shaw home and water stock.

When the evidence thus demonstrated that Abraham had fraudulently concealed his intentions not to perform the contract, and had fraudulently led both Boyce and Shaw to believe that what he intended to do was borrow on the water stock and real property, and when it was further revealed by his testimony that he did neither but gave the mortgage to his mother to secure an antecedent indebtedness and sold the water stock to obtain the down payment, it became necessary to amend the pleadings to conform to this proof. Proof, which in a large measure, came from the defendant's own mouth. It is difficult to believe that it should have been any surprise to him.

Leave to file an amendment to the complaint was granted by the Court. The amendment was actually served June 29, 1959. This amendment sets up the fraud of the defendant, Rue Abraham, his deceit in the sale of the water stock and in the use of the home to secure antecedent indebtedness.

Rule 15 (b) of the Rules of Civil Procedures covers the allowance of amendments to conform to the evidence. Such motions are to be granted freely and the rule interpreted liberally so that the Court's time and energies in the trial of issues will not be wasted.

This Court, on several occasions, has upheld the Trial Court's actions in permitting amendments to be added after trial to conform to the proof. See *Morris v. Russell*, 120 U. 545, 236 P 2d 451, a case which was tried to a Jury. The Court held unanimously that the Trial Court's Order granting a Motion to Reinstate a stricken count, at the close of the trial, adding a Quantum Meruit count was the equivalent of permitting an amendment to conform to the proof and was not error.

Certainly, Judge Sevy was well aware during the whole case of the various issues being made and was able to permit the defendant, Rue Abraham, to add any additional proof that he thought applicable, or necessary, by reason of the amendment to the complaint. No additional evidence was offered. No continuance for the purpose of producing evidence was requested, although the defendant did object to the amendment being permitted.

Defendant's position becomes ridiculous when one considers that the evidence making necessary the amendment to the complaint was produced by the defendant, Rue Abraham, himself. Certainly, surprise at his own testimony could not be maintained successfully by him. His knowledge of the conduct which he engaged in was

complete. It was known at every stage of the proceeding and long prior to the complaint being filed.

In *Wells v. Wells*, 2 U. 2d, 241, 272 P. 2d 167, this Court upheld an amendment which changed the basic theory of recovery. Probably the most complete discussion of the theory of *Rule 15 (b)* is found in the case of *Hartford Accident & Indemnity v. Clegg*, 103 U. 414, 135 P. 2d 919, where the Court stated:

“Amendments should be liberally allowed in the interest of justice whenever it will aid in settling an entire controversy. The limitations thereon should be whether the matters involved are such as can be conveniently and effectually handled in one trial without injury to substantive rights.”

See also: *Reich et ux v. Christopoulos et al*, 123 U. 137, 256 P. 2d 238.

In a more recent decision the Court cites the *Hartford Case* and quotes it with approval. See *Jackson v. Cope*, 1 U. 2d 230, 266 P. 2d 500.

It is respectfully submitted that the Trial Court properly granted the Motion to Amend to conform to the proof and that no prejudice was caused to the defendants.

POINT II

CLEAR AND CONVINCING EVIDENCE
SHOWS FRAUD ON THE PART OF RUE
ABRAHAM ON WHICH PLAINTIFFS
RELIED.

Plaintiffs do not disagree with the principles of Law quoted from *Pace v. Parrish*, 122 U. 141, 247 P. 2d 273.

That case establishes the basic principles of law governing fraud and deceit actions.

Plaintiff has the burden to establish false representations of existing material fact, made knowingly and with the purpose of inducing reliance thereon with clear and convincing evidence.

Most of plaintiffs' case against the defendants is established by the testimony of Rue Abraham himself, as has been cited in the preceding point discussion, Abraham, during all the negotiations with Shaw and with Boyce, represented and stated to Boyce and Shaw that he wanted to procure loans on the real estate and on the water stock to raise the down payment of \$10,000.00. He also led parties to believe that he could make the payment of \$1,000.00 which became due one month after he entered possession of the property and would make the \$90.00 per month payments called for in the Contract.

Abraham, himself, admitted on his direct testimony that he never did tell Shaw he intended to sell the water stock (P. 153). He freely admitted that he did not tell Boyce that he was selling the water stock to get the down payment. (P. 188, P. 221, P. 222).

Nor did he disclose that he was intending and did give to his mother a mortgage on the Shaw property for \$5850.00 and that no part of this money was used for payment of \$10,000.00 made on the 22nd of December, 1958.

He took the stock the very day that he signed the

Agreement and sold it to obtain the down payment and on that same day executed and delivered to his mother the mortgage on the Shaw property without receiving any sum whatsoever from her.

Abraham also testified that he had no resources out of which he could pay the \$1850.00 payments which came due in the month of January and February, \$1,000.00 of which was to be paid to the Shaws, and \$850.00 of which was to be paid to his mother, Mary Abraham on the mortgage which she held.

The Court found that the Contract, Assignment, and Agreement, were instruments which Abraham used for fraudulent purposes and which he had no intentions of every performing. He did not perform even the first duty which became owing after the down payment.

His sly changing of the word "borrow" to the word "secure" and his insistence in placing in the contract the provision that there would be no deficiency judgment against him are clear indications of his fraudulent intentions and design, and establish beyond the purview of doubt that such intentions existed at all times, and at the time the Contract was signed on the 22nd day of December, 1958.

It is respectfully submitted that the testimony of Abraham alone without corroboration and verification by written documents and the testimony of Boyce and Shaw would be sufficient to justify the Trial Court in the finding that Abraham made false statements concerning his intentions, concerning his ability to carry

out the contract and fraudulently designed and planned to deprive the plaintiffs of their property without paying for the same.

POINT III

SUBSTANTIAL EVIDENCE SHOWS NEGLIGENCE ON THE PART OF GADDIS INVESTMENT COMPANY AND BEN BOYCE WHICH CAUSED DAMAGE TO PLAINTIFFS.

Defendants, Gaddis Investment Company and Ben Boyce, in the Brief filed, claim that there is no evidence which the Trial Court could find that Gaddis Investment Company and Ben Boyce did not exercise that degree of care which is necessary and requisite on the part of Real Estate Salesmen and Brokers.

Again, it appears that there is no real dispute between the parties concerning the law which is applicable and which sets down the duties required by a broker and real estate salesman. This Court has had occasion to spell out with great care these duties. In *Reese v. Harper*, 8 U. 2d 119, 320 P. 2d 410, the Court concerning the duty that a broker had toward his client, in a real estate transaction stated as follows:

**** "The agent is issued a license and permitted to hold himself out to the public as qualified by training and experience to render a specialized service in the field of real estate transactions. There rests upon him the responsibility of honestly and fairly representing the interests of those who engage his services, and upon failing to do so his license may be revoked. Accordingly, persons who entrust their business to such agents

are entitled to repose some degree of confidence that they will be loyal to such trust and that they will, with reasonable diligence and in good faith, represent the interests of their clients. Unless the law demands this standard, instead of being the badge of competence and integrity it is supposed to be, the license would serve only as a foil to lure the unsuspecting public into being duped by people more skilled and experienced in such affairs than are they, when they would be better off taking care of such business for themselves."

"2-4) Because of the specialized service the real estate broker offers in acting as an agent for his client there arises a fiduciary relationship between them; it is incumbent upon him to apply his abilities and knowledge to the advantage of; the man he serves; and to make full disclosure of all facts which his principal should know in transacting the business.***"

In the *Reese* case, the broker was claiming that his client should be barred from recovery because he did not read and understand the Earnest Money Receipt which had been prepared by the broker. The Court, in language which would certainly be applicable to the plaintiff in the present action, stated as follows:

"It is pertinent to observe that the broker Reese had Mr. Harper at even more disadvantage than might normally be expected. The wide difference in experience and business acumen resulting in the parties being in an unequal position for bargaining are things which the Court and Jury were entitled to take into consideration in determining the matters in contention between them. Mr. Harper was a farmer, obviously in-

experienced in business; was hard of hearing and therefore had some difficulty in conversing with others; and in addition thereto the Court made an express finding indicating that he was somewhat inept and lacking in acumen with respect to business affairs."

Grant Shaw, as has been demonstrated to the Court, did not have the education, experience or capacity to understand the very complicated and technical question of security rights, uses that may be made of property, and the financing involved where a Uniform Real Estate Contract is the document of sale.

Boyce, with his many years of experience, understood, or should have understood, the nature of a security transaction and the protection that the owner of real estate needs when selling the same and not receiving payment in full for his property. Boyce felt himself sufficiently qualified in such matters. He drew instruments and made interlineations in the contract on behalf of Shaw, matching wits with a carefully, fully trained expert and highly competent attorney.

In considering whether or not Gaddis Investment Company and Ben Boyce have properly discharged their duty to Grant and Ila Shaw, perhaps the Court should consider whether or not they rendered the kind of service which a lawyer normally would render and whether or not they rendered it in a workmanlike and competent manner since they undertook to perform duties normally entrusted to lawyers.

This Court has decided an additional case which is of real help in deciding the question presented by plaintiffs' claim against defendant, Gaddis Investment Company, and Ben Boyce.

In *Smith v. Carroll Realty Company*, 8 U. 2d 356, 335 P. 2d 67, the Court affirmed a judgment against the broker for negligence in failing to properly advise the client concerning the value of property involved in a trade.

In the *Smith* case, as in the present case, the client relied on the Broker and Salesman to advise and to give a careful and considered judgment on what the client should do.

There is no question but what the evidence clearly shows that Grant and Ila Shaw placed great reliance upon the skill experience, knowledge and business acumen which defendants Ben Boyce and Gaddis Investment Company represented that they possessed.

Concerning the right of a client to rely on his broker, this Court stated in the *Smith* case as follows:

"In our opinion plaintiffs were not required to make an independent investigation of the value of the Idaho property. Defendants having undertaken to determine and report the reasonable value of the Kladis property justified plaintiffs in relying on defendants. Nor were plaintiffs required to question defendant Smith's report when he said, " 'It looked like a good deal; looks like the property is worth it.' " "The report given plaintiffs by defendant Smith was such as to cause plaintiff to say, "Nate, you know I rely on you -

on your judgment - and if you say it is okay, it is okay by me."

Plaintiffs complain of the conduct of the defendants, Gaddis Investment Company, and Boyce, in several particulars. First, and the most serious lapse on the part of said defendants, was the delivery by Boyce to Abraham and his Attorney of the title to Shaw's property and the water stock endorsed in blank without getting any payment whatsoever on the property which was covered by the various agreements.

The normal procedures, as all are aware, for closing such transaction, would be for the Seller's representative, the Buyer's representative, and the Loaning Institute to sit down at a conference table and in one proceeding make the delivery of the title to the Loaning Institute, and the delivery of the money representing the down payment simultaneously. Certainly, if such procedure had been followed, it would not have been possible for Abraham to successfully defraud Shaw of the title to his home, and the water stock which he sold to a bona fide purchaser.

There was no question about Shaw's attitude concerning this. Shaw testified that he told Boyce he wanted the water stock fixed so that it could not be sold. (P. 242).

The only thing that Boyce and Shaw were anticipating Abraham would do is borrow on the water stock and the home to secure the down payment. (P. 244). When Boyce, without any notice to Shaw of his intention,

delivered the title to the home, and the water stock endorsed in blank, to Abraham, without getting any payment whatsoever, he placed in Abraham's hands the power to defraud Shaw, and this conduct on his part was the proximate cause of the fraudulent scheme perpetrated upon Shaw.

In addition to the conduct of Boyce, in turning over to Abraham the water stock and title to the home without obtaining the down payment, Boyce undertook to advise Shaw concerning the various legal and technical meanings of the language contained in the Uniform Real Estate Contract, Agreement, and Assignment.

One lapse on the part of Boyce that plaintiff bitterly complained about is the fact that in none of the agreements did Boyce put the proviso that Abraham would have no power to use the stock or title to the home, except for the purpose of making loans thereon to secure the down payment. Certainly there was adequate notice to Boyce from all parties that that was what was to be done and intended.

Not only did Boyce leave out part of the Agreement between the parties, but he permitted an insertion to be made in the documents by Abraham, that there would be no deficiency of any kind against Abraham. This particular clause was placed in the Agreement after it had been typed by Boyce. Boyce testified it was placed in the contracts by Abraham or his Attorney. When this matter was discussed by Boyce with Shaw, he told Shaw that the deficiency didn't amount to anything; that

it was about the same as he had already included in the Agreement (P. 259). And again, he assured Shaw not to worry about what Shaw describes as an insufficiency judgment (P. 260).

Boyce violated specific instructions by Shaw in turning over the water stock endorsed in blank because Shaw had told him that he did not want the water stock to be handled in such a way that he could not redeem it in case payments were not made according to the Contract (P. 265).

Certain items of property were given as additional security by the defendant, Abraham, one included an equity in a Duplex which amounted to between \$400.00 and \$600.00. The other included a lot which had a value of approximately \$700.00. Boyce advised plaintiff, Shaw, that in his opinion the lot was reasonably worth close to \$1200.00, and his opinion of the value of the duplex was \$8,000.00. In arriving at these conclusions, Boyce inquired of none of the local realtors, and based his opinions solely on his own examination which he admits he made without any investigation of real estate values in the town of Richfield, or in Sevier County. This conduct, this Court, in the *Smith v. Carroll Realty Co.*, supra case, held would justify a finding of negligence. He then advised and counseled Shaw in the preparation of the Contract.

Nielsen testified that, in his opinion, the lot which Boyce thought was worth around \$1200.00, had reasonable value of approximately \$800.00, and that the amount

of equity on the Lorna Ogden property was only \$661.96 at the time of trial in June of 1959 (R. 168).

It is respectfully submitted that the conduct on the part of Boyce adequately demonstrates that he did not exercise that degree of care which is usually exhibited and exercised by brokers and real estate salesmen in Salt Lake and Sevier Counties, State of Utah, and that his conduct was the causative factor which made it possible for Abraham to complete his fraudulent device and scheme, place a mortgage on the home of plaintiffs for antecedent indebtedness, and sell the water stock which plaintiffs owned to obtain a down payment, rather than borrow on these two items to obtain the down payment.

POINT IV

SUBSTANTIAL EVIDENCE ESTABLISHED THE DAMAGE OF PLAINTIFFS IN THE SUM OF \$5,000.00 GENERAL DAMAGES.

Both of the defendants in their appeals alleged that the Court did not have sufficient evidence before it to justify the award of general damages which was made. The Court granted Judgment against the defendant, Rue Abraham, for the sum of \$5,000.00 general damages, and \$1,000.00 punitive damages, and granted judgment against Gaddis Investment Company and Ben Boyce for \$4,250.00, with the proviso that any amount paid by Abraham would be credited on the amount owing by Boyce and Gaddis Investment Company.

The primary witness on damages was Morris Nielsen. Mr. Nielsen had had 15 years of experience in the Richfield and Sevier County Area, and was at the time of his testimony, a bank official charged with the responsibility of appraising property for loan purposes in Sevier County and the Richfield Area. His qualifications as an expert on property matters did not seem to be in any way questioned.

Nielsen testified that the farm land and water, considered as a unit, would be, in his opinion, worth about \$13,140.00. That the water stock alone would have a reasonable value of \$11,700.00. This left the land value, without the water, at \$1440.00 for the forty-eight (48) acres. This land valuation is verified by the testimony of the witness Shaw (P. 251) where he indicated that since the sale to Abraham he had been offered \$1,000.00 for 28 acres of the land, and \$1200.00 for the total forty-eight (48) acres. The Nielsen appraisal of \$1440.00 seems to be well within the range of reasonable value.

Nielsen testified that the home of the plaintiffs, when separated from the operational farm unit, would have a value of approximately \$5,000.00. Since the water had been sold off the land itself, the operational aspect of the home and farm, is completely destroyed. It is no longer a unit which can be operated as a farm-home combination.

Plaintiffs submit that the following calculation of actual damages is sustained by the evidence of Morris Nielsen. Original sale price and agreed value of plain-

tiffs' property is \$22,000.00. The property received back after trial, and the rescission of the contract are as follows:

Agreed value of Shaw property.....	\$22,000.00
From the sale of water stock.....	\$10,000.00
Land Value	1,440.00
Home Return	5,000.00
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Total value of property received by plaintiffs in the rescission of Contract....	\$16,440.00
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Net loss suffered by plaintiff as result of the conduct of defendants.....	\$ 5,360.00

In addition to this loss, the plaintiff is out the \$300.00 which he paid the Gaddis Investment Company and the costs and attorney's fees which he incurred in the trial of the action for rescission. No item was separately awarded to the plaintiffs as Attorneys' fees though such would have been justified.

Reasonable rental for use of the home and land was not considered in arriving at the loss sustained by plaintiffs.

It is respectfully submitted that the Court's decision and calculation of the damages is below what would have been justified had the Court accepted in its full amount the valuations placed by the witness, Morris Nielsen, on the land, water and other items which were lost by reason of the conduct of defendant, Rue Abraham, and Ben Boyce, acting as the representative of Gaddis Investment Company.

It is respectfully submitted that the Court's appraisal of damages is adequately and fully supported by the evidence produced and is a most modest award for the loss sustained by plaintiffs.

CONCLUSION

Plaintiffs respectfully submit that the Findings of Fact, Conclusions of Law and Decree of the lower Court are fully supported by substantial evidence, are in accordance with Law, and this Court should affirm the Lower Court's Judgment as entered.

Dated this day of....., 1961.

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