

execute the contract in question by the fraud and misrepresentation of the plaintiffs, and that the plaintiffs, or one of them, fraudulently represented to him, knowing the same to be untrue, that there were upon the mining claims in question large quantities of merchantable iron ore, and that the said claims were capable of producing at least 65,000 tons, long tons, of such merchantable iron ore per annum, whereas the claims had not thereon nor were capable of producing iron ore in any merchantable quantities whatever.

No evidence was adduced at the trial from which I could find that any fraudulent representations were made to the defendant by the plaintiffs. The fact of the matter was, that the defendant was in just as good a position, through his agent, Harris, and the knowledge he had obtained from him, as the plaintiffs, about the character of the properties in question and their possibilities.

The defendant also alleges "that the basis of the agreement, and particularly paragraph 3 thereof, was, that it was possible to work, raise, and remove from the mining claims in question not less than 65,000 long tons of merchantable iron ore per annum, and that the true intent and meaning of the parties, which was set up or intended to be set up in the agreement, was, that a royalty of 15 cents should be paid on every long ton worked, raised, and removed" from the mining claims, "providing that an average quantity of not less than 65,000 of such long tons should be removed from the said mining claims or locations every year, or the said royalty should be payable on that quantity, when weighed at the mine's mouth, whether that quantity should be actually removed from the said claims or locations or not."

He also further says "that, notwithstanding the expenditure of upwards of \$75,000, the employment of competent mining experts, and the use of the most improved methods of mining and the best machinery, no merchantable iron ore whatever can be discovered upon the said mining claims, and that it is impossible to remove 65,000 long tons, or any commercial quantity whatever, of merchantable ore."

He further alleges that the "plaintiffs are not entitled to recover a royalty upon ore that does not and never did exist, and which, therefore, cannot be removed."

He further "submits that there has been entire failure of consideration for the alleged agreement, and the payments made by him to the plaintiffs in connection therewith."

By way of counterclaim, he asks that the agreement shall be declared null and void and of no force or effect, and for re-