

1949

J. M. Webb v. Margaret Webb : Brief of Respondents

Utah Supreme Court

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In the Supreme Court of the State of Utah

J. M. WEBB and
SPENCER WEBB,

Plaintiffs and Respondents,

vs.

MARGARET WEBB and
MARGARET WEBB,
Administratrix of the Estate
of Wilmer Webb, Deceased,

Defendants and Appellants.

No. 7208

FILE

JAN 12 1940

CLERK, SUPREME COURT,

BRIEF OF RESPONDENTS

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No. 7208

BRIEF OF RESPONDENTS

PRELIMINARY STATEMENT

On October 26, 1946, the plaintiffs commenced this action against the defendants to quiet title to a number of parcels of real estate and water rights, and a number of head of livestock and farm machinery and equipment, all situated in Millard County, Utah. The real estate consists of a home in Deseret, and a few tracts of farming land. After demurrers to the complaint were over-

ruled defendants secured more time to answer and finally on June 10th, 1947, filed their separate answers and counterclaim.

The answer and counterclaim of Margaret Webb, as administratrix of the Estate of Wilmer Webb, by way of counterclaim alleges that she married Wilmer Webb on July 21st, 1945, and that he died intestate on the 4th day of July, 1946, leaving her as his sole surviving heir; that at the time of his marriage he was about 42 years of age and was the owner of the property described in plaintiff's complaint, plus a few additional items of personal property; that for many years prior to March 18, 1946, Wilmer and the plaintiffs were partners in the farming and livestock business and owned certain partnership property; that on or about the 15th day of March, 1946, by mutual consent of the plaintiffs and Wilmer the partnership was dissolved, at which time the plaintiffs promised to account for and pay Wilmer the proportionate share of all moneys previously collected by them and to render to the defendant on demand an accounting; that the plaintiffs refused to account to her; that she has been in possession of the home property and claims it as a widow's homestead; that she and her husband on March 15th, 1946, executed to the plaintiffs a deed covering the lands and water rights described in plaintiffs' complaint; that about March 18, 1946, Wilmer executed to plaintiffs a bill of sale to the personal property described in the

complaint; that said transfers and conveyances were made without any other consideration than as a mortgage to secure sums to be advanced for the benefit of Wilmer and his wife. The administratrix prays that the bill of sale and deed be determined to be a mortgage, and that the court require the plaintiffs to make an accounting to her. (Tr. 19-25).

The amended answer of Margaret Webb as an individual alleges much the same factual situation as the answer of Margaret Webb as administratrix, and in addition alleges that Wilmer began ailing in September, 1945, and his ailment continued to grow worse until he was hospitalized in March, 1946; but that she did not know that his ailment would be fatal; that about March 15, 1946, an attorney for Wilmer and the plaintiffs fraudulently represented to her that it would be easier for plaintiffs to finance the medical care and hospital expenses if she and her husband would turn over Wilmer's property to plaintiffs; that the property was worth the sum of \$30,000.00; that she accepted a check for \$500.00 as a consideration for signing the deed but that the check has never been cashed; that she did not intend to waive her statutory one-third interest in her husband's property; that the deed was made without consideration; that the deed was procured from her with the express intention of cheating and defrauding her and is void. She prays that the conveyances be set aside and title to the property

be quieted in the defendants. (Tr. 34-44).

The brief of appellants, pages 5 to 20, sets forth the defendants' counterclaim in detail, and the above references to the allegations of the answer are therefore very brief.

The trial court determined the issues in favor of the plaintiffs and made rather extensive findings of fact and concluded that the plaintiffs are the owners of the realty and personalty and entitled to the immediate possession thereof; that the defendants are entitled to take nothing by reason of the counterclaims, excepting as otherwise provided; that the defendants are not entitled to an accounting upon the evidence as produced in the trial, but that the right to an accounting should be rejected and denied without prejudice to the right of the defendant to apply for an account hereafter, if she be so advised. A decree was entered in favor of plaintiffs and against the defendants accordingly. (Tr. 51-62). Also see appellants' brief, pages 23 to 34.

ARGUMENT

Defendants Were Not Entitled to Trial by Jury

Appellants' assignment of error No. 1 urges that the court erred in not granting a jury trial. There are a number of reasons why the refusal of the trial court to call out a jury is not error.

A review of the pleadings, and a review of the facts

and circumstances leading up to the request of the appellants' for a jury trial will be helpful in determining the question here involved.

The action was commenced by a complaint setting up a cause of action to quiet title to real and personal property, (Tr. 4-8). We concede that under the decisions of this Court a suit to quiet title has been held to be an action at law. (*Babcock vs. Dangerfield, et al.*, 94 Pac. (2nd) 862, 98 Utah 10; *Bolognese vs. Anderson*, 90 Pac. (2nd) 275, 97 Utah 136; *Norback vs. Board of Directors*, 37 Pac. (2nd) 339, 84 Utah 506).

But the question still remains: Are the issues or the major issues under the pleadings equitable. If equitable, then respondents contend the appellants were not entitled, as a matter of right, to a trial by jury.

We call attention to the concurring opinion of Mr. Justice Wolfe in the case of *Petty vs. Clark*, 102 Utah 186, 129 Pac. (2nd) 568, at page 571, wherein it is said:

“In the case of *Norback vs. Board of Directors of Church Extension Soc.*, 84 Utah 506, 37 Pac. (2nd) 339, 345, this court laid down the rule: That ‘If the issues are legal or the major issue legal, either party is entitled upon proper demand to a jury trial; but, if the issues are equitable or the major issues to be resolved by an application of equity, the legal issues being merely subsidiary, the action should be regarded as equitable and the rules of equity apply. *Coulson vs. LaPlant*, Mo. Sup., 196 S. W. 1144;

Southern Pac. Land Co. vs. Dickerson, 188 Cal. 113, 204 Pac. 576; Park vs. Wilkinson, 21 Utah 279, 60 Pac. 945."

The answer of Margaret Webb, as administratrix of the estate of Wilmer Webb, deceased, by way of affirmative defense and counterclaim, alleges that on the 15th day of March, 1946, Wilmer Webb and the defendant made and executed to the plaintiffs a certain deed covering the lands described in the complaint, but that it was given as a mortgage and without any other consideration, (Tr. 21-22). Also that to further secure moneys to be advanced by the plaintiffs, Wilmer executed to plaintiffs a bill of sale of the property described in plaintiff's complaint (Tr. 22). In the prayer defendant asks that the deed and bill of sale be determined to be a mortgage or mortgages, that the court find the amount advanced or paid out by plaintiffs and require plaintiffs to convey all of the property to the defendant under payment of such indebtedness (Tr. 25).

The amended answer and counterclaim of Margaret Webb, as the widow of Wilmer Webb, deceased, pleads that on March 15th, 1946, an attorney for the plaintiffs and Wilmer Webb called on her and made certain representations; that for a consideration of \$500.00 she signed the deed; that the deed was obtained from her and from Wilmer, thereby vesting the apparent legal title to said lands in the plaintiffs; that the deed was obtained with

the intention of cheating and defrauding her out of her widow's one-third right, title and interest in the property, and without any consideration; that Wilmer Webb executed the bill of sale with the intention of cheating and defrauding defendant and that the transfer was without consideration and void (Tr. 35-40); that she executed the deed believing it was a mortgage, relying upon the representations made to her; that the bill of sale and deed were given to defraud her out of her statutory one-third right, title and interest in her husband's estate, and that she will suffer great loss and damage for which she has no plain or speedy adequate remedy at law, (Tr. 41); that portions of the real estate described in the deed is the home of the defendant and is claimed as a widow's homestead, (Tr. 42). The prayer asks that the deed and bill of sale be cancelled and set aside, and if said instruments are not so vacated they be held to be mortgages only (Tr. 42).

The answer of the administratrix (paragraphs VII, VIII and IX of the first affirmative defense and counter-claim, Tr. 22-23), attempts to plead the right to an accounting, and prays that the court require the plaintiffs to make an account of all receipts and disbursements from or on account of claimed partnership property, (Tr. 25).

The major issues, therefore, were to be resolved by an application of equity, and the legal issues, if any, were merely subsidiary. In other words, the basis of the plain-

tiffs' claims and title to the property was the deed and bill of sale passing title to them, and the execution of both were admitted and acknowledged by the defendants' respective answers. The defendants themselves treated the issues as equitable and so announced to the court when the case was called for trial, as evidenced by the following:

THE COURT: * * * There may be a question also as to whether this is a case in which the defendant has a right to a jury trial, being equitable issues involved, it should be decided by the court in any event.

MR. UDELL R. JENSEN: We had in mind that the jury would be advisory to the court. May the record show the money was tendered to the clerk before the setting, and upon suggestion of the court that the money was returned to the defendant's counsel.

THE COURT: The record may show that the jury fee was tendered to the clerk before re-setting of the case, but not before the previous setting. (Tr. 89-90).

The plaintiffs' sole proof in their case in chief was the introduction in evidence of the deed executed by Margaret Webb and Wilmer Webb, and the bill of sale executed by Wilmer Webb, by which title to the realty and water rights, and personal property, passed to the plaintiffs. Since the execution of these documents were

pleaded by the defendants in their respective answers, there would be nothing, so far as the plaintiffs' cause of action is concerned, to submit to a jury. Whether the defendant Margaret Webb was entitled to claim a widow's statutory one-third interest in the realty, and whether she was entitled to claim a homestead, are questions of law which would not, in any event, be submitted to a jury for answer. The other issues, - those raised by the defendants' affirmative defenses, appear to be equitable.

Respondents do not rest their contention that appellants were not entitled to a jury trial solely on the basis that the issues raised by appellants are equitable. Respondents further contend that the appellants were not entitled to a jury trial because demand was not timely made, and a jury trial was for that reason waived. In all of the cases involving the question of a right to trial by jury, this Honorable Court has qualified that right by holding that it exists only "on proper application" and "if timely made." Certainly the defendants did not make a timely demand for a jury. On the contrary, the record shows the demand for a jury was made long after the case had been originally set for trial and at a time when the granting of a jury trial would have been inopportune and would have necessitated a delay of perhaps several months.

The complaint was filed October 26, 1946. Demur-

rers were filed November 22nd, 1946. On January 20th, 1947, and again on April 7th, 1947, the demurrers were overruled and defendants given fifteen days to answer, (Tr. 359). On April 7th, 1947, defendants' counsel was present in court, and the case was set for trial for May 13th, 1947. No jury was demanded, (Tr. 355-6). It is true that answers were not filed on April 7th, but under the order of the court the answers should have been, and the court expected answers would be served and filed on or before April 22nd. On May 10th, 1947, upon application of defendants, they were given until June 10th, 1947, to plead to the complaint, (Tr. 11). On May 12th, 1947, at the request of the defendants, the trial was continued to June 26th, 1947, and on the same day, when the case was again re-set for trial, the defendants did not request or demand a jury (Tr. 356). Again it will be observed that when this case was re-set for trial for June 26th, 1947, the answers should have been and the court expected answers would be filed by June 10th. On June 10th, 1947, separate answers of Margaret Webb, as administratrix, and Margaret Webb, as an individual, were filed.

On June 16th, 1947, at request of the defendants the trial was again continued over from June 26th, and again re-set for trial for July 15th, 1947, without a request or demand for a jury, (Tr. 356). On July 14th, 1947, and one day before the trial date, for the first time, the defendants requested a jury and paid the jury fee, (Tr. 356). Pre-

vious to July 15th, 1947, the defendants requested a further continuance, and on July 15th, 1947, the following proceedings were had in Court:

This case having been heretofore set for trial this date, and counsel for defendants having requested a continuance thereof and having also requested a jury trial, and counsel for plaintiff having stated that he would resist a further continuance of the case unless trial could be had at an early date, it was ordered that the case be set for non-jury trial Wednesday, September 3rd, 1947, at ten o'clock A. M. The clerk was directed to notify counsel for defendants of the setting and was also directed to return to defendants' counsel the jury fee tendered. (Tr. 357).

It must be assumed from the foregoing proceedings that an early trial could not be had before a jury, and the court did not feel that the trial should be unduly delayed because of a request for a jury made after the case had been set for trial several times and continued at the request of the defendants, and particularly when the request for a jury was made one day before the trial date. This Honorable Court should not assume the action of the trial court was arbitrary and without good reason, but on the contrary should assume that with good reason the trial court could not call out a jury during the month of September. It is common knowledge that the population of Millard and adjoining counties consists largely of farmers who are busy irrigating and later harvesting

crops during the late summer and early fall of the year, and it is very difficult to call out and secure a jury at that time of the year. It is also common knowledge that in counties such as Millard, where the territory is large and prospective jurymen are required to travel many miles to the county seat, the cost to the county of calling out a jury for a special case is prohibitive. Without doubt the court felt an early trial could not be had if the case should be tried before a jury, and without doubt the court felt the plaintiffs were entitled to an early trial after the several continuances at the request of the defendants.

One of the rules of the District Court of the Fifth Judicial District provides as follows:

When a jury is demanded in civil cases, triable by jury, a failure to deposit the jury fee required by law at the time of, or prior to the setting of the case for trial, shall be deemed a waiver of the right to a jury trial. (Tr. 357).

Under the above circumstances, it has been held by this Court, in common with practically all other jurisdictions, that the demand for a jury was not made timely, and hence was waived, and that the trial court did not abuse its discretion in refusing to grant a jury trial.

Sec. 104-23-6, U.C.A. 1943, provides: Either party to an action of the kind enumerated in the preceding section who desires a jury trial of the same, or of any issue thereof, must demand it, either by written notice to the clerk prior to the time of setting

such action for trial, or within such reasonable time thereafter as the court may order, *or orally in open court at the time of such setting* * * * * .

The statute in question does not provide, as do the statutes of some states, that a jury must be demanded "after issue joined" or that a case may not be set down for trial until after all of the pleadings have been filed. In the case at bar the record shows that the defendants' counsel was in court at the time the case was first set down for trial. The record shows also that the answers of the defendants should have been filed long prior to the trial date, and the answers were delayed at the express request of the defendants.

It was held in the case of *Utah State Building and Loan Assn. vs. Perkins, et al.*, 53 Utah 474, 173 Pac. 950, "it will be seen that the demand for a jury at the time the case was called for trial came too late. Unless there is some record showing a demand at the time specified in the statute, a refusal, and an exception taken to the ruling of the court, the matter is not before this court for review, and the right or privilege of trial by jury will be held to have been waived." Citing *Nichols vs. Cherry*, 22 Utah 1, 60 Pac. 1103; and *Davis vs. D. & R. G. R. Co.*, 45 Utah 1, 142 Pac. 705, 709.

To the same effect are the cases of :

Board of Education of S. L. City vs. West, et al., 55 Utah 357; 186 Pac. 114;

Emerson-Brantingham Imp. Co. vs. Giles, et al.,
59 Utah 54, 202 Pac. 543;

It is a matter of discretion with court to allow or refuse a demand for a jury, when not made within statutory time or extended time provided by court rule, and it is not an abuse of discretion to refuse a late demand for jury trial, if no excuse is shown for failure to make timely demand. *Thompson et ux., vs. Anderson, et al.*, 107 Utah 331, 153 Pac. (2nd) 665.

A party who takes a position which either leads a court into error in procedure, or by conduct approves error committed by court, cannot later take advantage of such error. *Ludlow, et al., vs. Colorado Animal By-Products Co.*, 104 Utah 221, 137 Pac. (2nd) 347.

When the case at bar was called for trial and when the court announced there might be some question as to whether the Webb case was one in which the defendants had a right to a jury trial because the issues involved were equitable and should be decided by the court, counsel for defendants did not urge that this was a law case in which they had an unqualified right to a jury, but conceded that they had in mind that the jury would be advisory to the court, (Tr. 89-90).

In the case of *Osage Oil & Refining Co. vs. McDowell, et al.*, 220 Pac. 609 (Okla.), the court set a trial date for Dec. 9, 1922, the parties in open court having waived a jury. On Dec. 9th the cause was continued, without ob-

jection, to the 15th day of December, 1922, when one of the parties demanded a jury trial, which demand was denied. The Supreme Court of Oklahoma held the demand came too late. In the case at bar counsel for defendants was in court when the case was originally set down for trial, and under the statute waived the right to trial by jury by failing to make his demand at that time. We contend that having once waived the right to trial by jury, a litigant is not entitled to a jury trial as a matter of right because of a continuance.

Where action was called for trial and parties waived a jury but trial was continued to a later date, denial of request for a jury trial at subsequent date was not an abuse of discretion. *Ezzell vs. Endsley*, 169 Pac. (2nd) 309, (Okl).

Refusal of demand for jury trial filed July 19th, 1935, in action commenced in April, 1934, in which defendant entered appearance May 31st, 1934, after case had been noted for trial in May, 1935, is not an abuse of discretion, since demand was not seasonably filed. *Niemeier vs. Rosenbaum*, 63 Pac. (2nd) 424, Wash.

The record shows that throughout the proceedings the appellants adopted a course of delays in pleading and further delays in getting the case to trial.

If the appellants are entitled to a trial by jury under the circumstances herein enumerated it would be tantamount to holding that, having once waived the right to a jury trial by failing to demand it when the case is orig-

inally set, diligent attorneys and litigants who are ready for trial at the time set cannot regain that right, but the dilatory can regain such a right by requesting and procuring one or more continuances. In fact, it would be tantamount to holding that litigants, by securing one or more delays or continuances after a case is once set for trial, could secure a jury trial by artifice and indirection when such a right could not be otherwise secured.

Findings of Fact Are Supported by Evidence

Appellants urge that the findings of fact are not supported by, but are contrary to, the preponderance of the evidence. Respondents, upon the contrary, contend that the findings are not only supported by the evidence, but that the evidence preponderates in favor of the findings and the trial court could not have properly found otherwise.

At the outset the appellants find themselves in the unenviable position of asserting that the case at bar is an action at law and consequently they were entitled to a jury trial, and then urging that the trial court should be reversed because the findings are contrary to a preponderance of the evidence and "will in *equity* be vacated and set aside." If the case be an action at law and the major issues are legal and not equitable, then the rule to be applied must be:

A finding by the trial court in an action at law

supported by some substantial evidence cannot be disturbed on appeal, tho the Supreme Court might find differently. *Musser vs. McCornick & Co.*, 57 Utah 62, 192 Pac. 1052.

See also :

Hanson vs. Greendale, 62 Utah 168, 218 Pac. 969.

Kelley vs. Moab State Bank, 64 Utah 290, 230 Pac. 566.

Baker vs. Wycoff, 95 Utah 199, 79 Pac. (2nd) 77, at page 83.

It will not be sufficient to say that the findings are contrary to a preponderance of the evidence, since the rule is that if there is any substantial evidence to support the findings, the findings must be upheld.

However, if this case be considered as one in equity, then the rule to be applied is :

The Supreme Court on an appeal in an equitable action will consider questions of fact as well as questions of law, but will not disturb findings of fact where the evidence is conflicting, unless it is made to appear that the findings are clearly against the evidence * * *. *Gee, et al., vs. Baum, et al.*, 58 Utah 445, 199 Pac. 680.

See also :

Turnbull vs. Meek, 58 Utah 23, 196 Pac. 1008.

Singleton vs. Kelly, 61 Utah 277, 212 Pac. 63.

In the Singleton case above cited this court stated

“unless the evidence clearly preponderates against the findings as made by the lower court its decision must stand.”

The testimony, excluding the matters concerning an accounting, is rather brief. The only evidence in the record upon which many of the pertinent findings are predicated, is that of Margaret Webb, and Dudley Crafts, an attorney at Delta. A review of their evidence will certainly convince this Court that there is substantial evidence to support such findings. In fact, it will convince this Court that there is a preponderance of the evidence to support such findings.

The findings of fact are comprehensive and determine all of the issues raised by the pleadings. It appears from the evidence and from the findings made therefrom that Wilmer Webb was a man of about 42 years of age when he and Margaret Webb were married; that Margaret had been married before and divorced and had three children by a former marriage. There were no children born as the issue of the Webb marriage. The parties were married on July 21st, 1945. Wilmer began ailing during the month of September, 1945, and his ailment continued to grow steadily worse until February, 1946; in March, 1946, he was hospitalized at Salt Lake City and remained in the hospital until his death on July 4th, 1946. The parties were married less than a year when Wilmer died. Shortly after the marriage there were a number of differences

between the parties and there was some discussion of a separation and divorce. About March 15th, 1946, and while Wilmer was in the hospital he discussed with Dudley Crafts, an attorney at law, the marital difficulties then existing between himself and wife, and requested Mr. Crafts to visit Margaret and see if she was willing to effect a reconciliation and remain at the home permanently and take care of Wilmer, and if she was unwilling to do so, then to make arrangements with Wilmer's brothers, (respondents herein), to take care of him during the balance of his lifetime and pay the expenses incident to his illness and provide for him the balance of his lifetime. The consideration for payment of the expenses and care of Wilmer would be the transfer to respondents of Wilmer's property. At that time Wilmer knew he would be unable to work for a considerable length of time and that he might be an invalid for his remaining lifetime. Margaret was also aware of this situation.

Mr. Crafts visited Margaret and attempted to procure her consent to remain with Wilmer as his wife, and look after Wilmer when he returned home. She informed Mr. Crafts that a reconciliation would not be possible and when the school term ended in May of 1946, she was going to leave Wilmer, but wanted to occupy the home and use his car until she left.

Mr. Crafts then suggested that under such circumstances the plaintiffs were willing to undertake Wilmer's

support and pay all medical and hospital bills and take care of him during his lifetime, but that it would be necessary under such arrangement to have Margaret's signature to a deed covering the realty. Margaret stated she did not want any part of the property, but upon the suggestion of Mr. Crafts said she would accept \$500.00 if the plaintiffs and not Wilmer were paying the money. Mr. Crafts then prepared the deed and Margaret, out of Mr. Crafts' presence, took it before a notary public and executed and acknowledged it. The deed was then taken to Salt Lake where Wilmer executed it, and at the same time executed a bill of sale to his personal property and executed to the plaintiffs a transfer of the title to the car. The deed and bill of sale and certificate of title to the car were then delivered by Wilmer to the plaintiffs. Practically all of the above facts are shown by the testimony of Mr. Crafts, (Tr. 274 to 298).

The real estate with water rights were worth \$8966.00 and the personal property transferred was worth \$4671.00, including war savings bonds worth \$575.00. (Finding No. 15, Tr. 55).

About three months after the execution of the deed and bill of sale Wilmer died. Immediately after signing the deed Margaret consulted an attorney and thereafter did not cash the check, but she took no action to rescind or annul the deed or repudiate the transaction until after Wilmer's death. (Finding No. 10, Tr. 54).

After Margaret refused to remain with Wilmer, or to stay at the home beyond the school season, the plaintiffs, Jack and Spencer Webb, brothers and former partners of Wilmer, agreed with Attorney Crafts, who was representing Wilmer, to take care of Wilmer the balance of his lifetime, and to assume and pay all of Wilmer's expenses. At that time Wilmer was in the hospital and many expenses had been incurred. More could be anticipated in the immediate future and perhaps for months and even years to come.

It is quite obvious from the record that marital difficulties commenced shortly after the marriage, and when it became apparent to Margaret that her husband was a very sick man likely to be a permanent invalid, she was going to "run out on him." It is equally obvious that when Margaret had reason to believe all of Wilmer's property would be used up in paying tremendous hospital and doctor bills, and that Wilmer's ability to support her and her children was gone, she would not remain with him or be tied down to or assume the care of an invalid. It seemed obvious that all the assets would be dissipated because in a period of approximately three months the expenses amounted to many hundreds of dollars. There was no percentage in Margaret's remaining, particularly when two brothers were willing to assume Wilmer's care during his lifetime, even though the assets did not cover the expenses. She was more than willing to "get out

from under," but when Wilmer died in about three months, and the expenses incurred were but \$1750.00, she found she had made a bad bargain and concluded to repudiate the entire transaction and claim Wilmer's property. This Court cannot help but conclude from the testimony that Wilmer's wife was callous and coldblooded, without the slightest regard for her moral obligations as a wife.

The correspondence between Margaret and Wilmer, while Wilmer was in the hospital, shows the pattern, and corroborates the testimony of Mr. Crafts to the effect that Margaret refused to effect a reconciliation and intended to leave in May as soon as the school season was over. Defendants' exhibit "Y" (referred to as exhibit 3 in defendants' brief) is a letter written March 5th to Wilmer and contains this statement: "It isn't fair to you to have us here using your house and cream checks when you could use them, so I will start looking around and see what arrangements I can make. Then you won't have so much to worry' about." On March 8th Margaret again sent a letter to Wilmer, (Ex. 3), in which she said: "It wouldn't look very good for me to walk out on you while you are ill, so hurry and get well." On March 10th, after receiving Margaret's letters Wilmer begged her to stay on and not leave him (Ex. E). He said to Margaret: "Honey, you said you would do anything to help me while I was up here. You can by at least staying until I can

come home and can help me more by staying much longer for I don't love anybody else. * * * You said you were going to look around. Honey, please don't until I get home. * * *'' On March 14th, in answer to Wilmer's letter, Margaret stated, (Ex. R): "Don't worry about anything down here we are getting along alright. I guess things can go along like this for a while longer, at least until you are on your feet again and can take care of your self."

Mrs. Webb's answers on cross-examination (Tr. 142 to 161 and 169 to 184), attempting to explain what she meant by the above statements in her letters, were so evasive and unsatisfactory as to convince the trial court that Mr. Crafts' testimony should be given greater credence than the testimony of the defendant. In fact even a casual reading of her testimony must lead one to the conclusion that her testimony is not entitled to credence where it conflicts with the testimony of Attorney Crafts.

Mr. Crafts, an attorney who has practiced law at Delta, Utah, since 1924, testified that he was requested by Wilmer Webb, as a friend, to interview Margaret Webb. This request was made while Wilmer was in the hospital, and between March 10th and 14th. Wilmer advised Mr. Crafts that his (Wilmer's) wife was going to leave him and asked if an attempt should be made to effect a reconciliation, and if that could not be done what arrangements should be made to take care of the expenses and to take

care of him for the rest of his life. Mr. Crafts suggested if the wife would assume no responsibility that Wilmer's brothers be asked if they would take care of him for the balance of his lifetime and assume the expenses of hospital, doctor bills, etc., and that he, Wilmer, make a property settlement with them by conveying his property to them. (Tr. 276-277).

Mr. Crafts then went to see Margaret Webb on March 14th at Deseret. A rather lengthy conversation ensued in which Mr. Crafts told Margaret that Wilmer was very ill and wanted to effect a reconciliation and have her continue on as his wife. Margaret stated she never could effect a reconciliation. She was then told that Wilmer would be a cripple and wouldn't be able to get around at all for a year to a year and a half and was asked if under those circumstances would she just stay in the house and care for Wilmer during his illness. She said she was not willing to do that - she definitely had made up her mind to pull out as soon as the present school term ended and under no circumstances would she stay longer. (Tr. 279-280). She was then asked if she would be willing to make a property settlement and file suit for divorce so Wilmer would know how much he had to pay her, and how much property he would have left to make arrangements for his care during the remainder of his life. She stated all she wanted was to take what she had brought with her; that they were married only a short time; that the children

were not Wilmer's; and she did not feel she was entitled to any of Wilmer's property, (Tr. 280). She was then told that if she was not willing to stay and take care of Wilmer, he wanted her to take what part of the property she thought she was entitled to and that he would then convey the rest of it to his brothers with the definite understanding that it would be their obligation to pay all his bills and support him and give him personal care during his remaining years. She was asked if she would join in such a conveyance and she again stated she did not want any of Wilmer's property but wanted only to remain in the home until the school year ended and to have the use of the car during that period, (Tr. 281). Mr. Crafts told Margaret if she executed the deed she would be signing away absolutely all rights of every kind in all property and that she should not do so without some consideration, and without some counsel. They discussed the sum of \$500.00 to be paid to her as the monetary consideration. (Tr. 281-282).

Thereafter Mr. Crafts prepared the deed and took it to Margaret at Deseret, with a check for \$500.00, and requested her to sign the deed and have her signature notarized. Margaret then walked across the street where a notary was available, signed the deed and brought the acknowledged deed back to Mr. Crafts and accepted the check for \$500.00, (Tr. 282). Previously Mr. Crafts advised Margaret that if Wilmer came home Jack would take

him right into his home and give him the best possible care as long as he lived. Margaret stated she was sure if Wilmer had a chance to think it over he would realize this arrangement was for the best, (Tr. 284-285). Mr. Crafts was not representing either of the plaintiffs. It should be borne in mind that at all times Mr. Crafts was representing Wilmer, and Wilmer alone.

Some short time after the above conversation and signing of the deed by Margaret, Mr. Crafts again visited Wilmer at the hospital and related to him the results of the conversation with Margaret. Wilmer then asked about the arrangements which Mr. Crafts had with Jack and Spencer and was told that he (Crafts) had the promise not only of the brothers, but their wives, that they would care for him, (Tr. 286).

Mr. Crafts then testified that both Jack Webb and Spencer Webb were advised on March 14th, 1946, that Wilmer's condition was very serious; that some arrangements would have to be made for his care; that he might live for a number of months or years but would never again be able to do work and would likely be a cripple the rest of his life; that some financial arrangements would have to be made for Wilmer's care; that it was probably Wilmer's desire that he convey his property to them with the definite promise on their part that they pay all of his doctor bills, hospital expenses and other obligations and would support and care for him as long as he

lived, regardless of how long that might be. They were asked point blank if they would be willing to assume the responsibility of caring for Wilmer as long as he lived and pay his bills, regardless of how much it might cost them. Mr. Crafts insisted that they discuss the matter with their wives, as the wives might have the personal responsibility of nursing Wilmer. The plaintiffs and Jack's wife were willing to take Wilmer into their home and nurse and care for him as long as he lived, (Tr. 280-281). On the following day, March 15th, after the deed was signed by Margaret, Mr. Crafts told the plaintiffs that arrangements had been made and they were definitely to assume the responsibility of paying Wilmer's hospital and doctor bills and other obligations and they agreed to go up to Salt Lake the next day to pay the bills thus far incurred, and when Wilmer came out of the hospital arrangements would be made to take him right into Jack's home, (Tr. 293).

Spencer Webb testified that Mr. Crafts asked him and Jack if they would be willing to take on the responsibility of caring for Wilmer and paying his bills, etc., if in return Wilmer's property was conveyed to them. Both brothers agreed to the arrangement, (Tr. 299 to 303). J. M. (Jack) Webb testified to substantially the same thing and to his obligation to assume joint responsibility with Spencer, (Tr. 324 to 328).

It appears very clearly from the record that there is

ample support in the evidence upon which to predicate the findings. The defendant, Margaret Webb, both as the widow of Wilmer Webb and as the administratrix of his estate, had the burden of establishing her affirmative defenses and counterclaim, and she failed in such burden of proof. Even under the equity rule, where the evidence is conflicting, this court will not disturb the findings of fact because it is *not* made to appear that such findings are clearly against the evidence. We are confident the defendant has not and cannot indicate one single finding or portion thereof that is not supported by the evidence, or that is contrary to the preponderance of the evidence.

Evidence as to Value of Property

Defendants complain that the Court erred in rejecting their offer to prove the value of the home at Deseret by showing the amount a purchaser was willing to pay for it. The Court found the value of the home to be \$4000.00, as testified to by Mr. Crafts, who qualified as an expert on real estate values, (Tr. 273-274). The witness Mary A. Anderson testified that from her inquiry concerning the value of the property she had a judgment of its reasonable market value and that it was worth \$6000.00, (Tr. 269-270). Therefore the matter of whether she was willing to buy the home and what she would pay for it was immaterial, and the court was correct in so holding.

However, in any event, if we assumed that the court did err in refusing the offer, such error would be immaterial. The court could still find the value to be \$4000.00 based on the testimony of attorney Crafts, a far better authority on values than Mrs. Anderson, the prospective purchaser. Also, if the conveyance of the property by Wilmer and his wife to the plaintiffs is upheld, the matter of value is of no importance.

Conversations Claimed by Appellants to Have Been Hearsay and Confidential Should Nevertheless Have Been Admitted by the Trial Court

We are at a loss to know upon what theory the appellants contend that the testimony of Dudley Crafts in the particulars set forth in their assignments of errors Nos. 3 to 7, are hearsay or constitute confidential communications and therefore inadmissible. Certainly in appellants' argument concerning such assignments of error (their brief pages 85 to 57) nothing is said to indicate appellants' theory. In fact nothing appears excepting the bald statement that such conversations are hearsay and privileged.

When the plaintiffs introduced the bill of sale and the deed, they made out a *prima facie* case and rested. There can be no question but what a conveyance is presumed to have been supported by a sufficient consideration; that the law presumes at least a nominal consideration; that

the burden of proof is upon the party seeking to avoid a deed; and one attacking the validity of a deed has the burden of defeating the presumption of consideration. These principles are so well established and recognized it is deemed unnecessary to quote authority therefor. (See *Babcock vs. Dangerfield*, 98 Utah 10, 94 Pac. (2nd) 862).

When plaintiffs rested, Margaret Webb took the witness stand in support of her affirmative defenses and counterclaim and testified at great length to the conversation between herself and Mr. Crafts. She testified to the things which she said Mr. Crafts told her. Certainly having opened up the matter of this conversation, Mr. Crafts was then properly permitted to state what he told Margaret Webb, even if in such testimony he was repeating what Wilmer Webb told him. Counsel for Margaret Webb asked her concerning a conversation with Wilmer Webb in the hospital on the morning of March 18, 1946, after the deed had been executed, at which time plaintiffs were not present, (Tr. 126-127). This conversation had to do with the transaction in question and particularly concerning the home, and whether Wilmer knew the home was included in the deed. When Mrs. Webb testified to conversations with her husband held outside the presence of the plaintiffs she could not with good grace object to Mr. Craft's testimony concerning conversations with Wilmer about the same matter and tending to dispute Margaret's testimony. The defendants voluntarily opened up the sub-

ject and respondents contend they were then entitled to meet the situation with testimony of the same kind and character.

Margaret testified that her husband never received anything for signing the deed or bill of sale. This testimony was permitted to stand over the objection of the plaintiffs, (Tr. 140). She also testified that Mr. Crafts told her if Wilmer was ever able to work and run his farm, all he would have to do would be to repay the money that was paid out for him and take back his property, (Tr. 142). This testimony on the part of Margaret Webb was introduced clearly in support of her allegation that there was no consideration for the execution and delivery of the deed and bill of sale. The conversations between Mr. Crafts and Wilmer as to the promises made by the plaintiffs to take care of him, and the conversations between Crafts and the plaintiffs concerning their promises and agreements, were in refutation of the claim of defendants that there was no consideration. Such evidence cannot be excluded under the hearsay rule, even if held in the absence of the defendants.

If plaintiffs cannot testify to their agreements to take care of Wilmer and pay Wilmer's bills, as the consideration for taking title to the property, merely because such promises were not made in the presence of Margaret, then how can they refute Margaret's testimony that "she did not know of her husband receiving anything for sign-

ing the deed and bill of sale.” They could testify to such promises made to Attorney Crafts, who was the representative of Wilmer, the same as they could testify to having made such promises and agreements directly with Wilmer if the conversations had been with and made directly to Wilmer. Would they be precluded from testifying to their business deal and arrangement with Wilmer merely because Margaret was not there, when she was claiming there was no consideration and that very fact was the point in issue.

If Mr. A contests Mr. B’s title to property because it is claimed “B” paid no consideration for such property, is “B” unable to testify to the amount paid, to whom and when paid, and the circumstances of payment merely because A was not there to hear the deal made between B and B’s vendor or see the passing of the consideration. Such a contention seems absurd.

It is claimed by appellants that Mr. Crafts, being Wilmer’s attorney, could not testify to conversations with his client after the death of the client without the consent of the administratrix. Such a contention is not supported either by any cases or texts cited. The true rule is set forth in *Jones on Evidence* (2nd Ed), Vol. 5, Section 2164, as follows:

“In addition to the exception to the general rule excluding confidential communications between attorney and client where questions concerning the

circumstances surrounding the execution of a will are in issue, it seems that the general rule yields to necessity in somewhat analogous instances in some jurisdictions, at least. Thus where, after the death of the client, litigation arises between parties all of whom claim under the client and the question to be determined is not the existence of a right of action against the estate but the intention of decedent as to creation of various rights which remain ambiguous, the attorney may testify. The reasoning is the same as in cases where the facts surrounding the execution of a will become material. In the broad sense of the term, all such matters are part of the 'res gestae,' that is to say, the issue being directly as to whether the client did or did not have such knowledge or do such acts or give rise to or control the rights of the parties, determination of the fact directly determines the rights of the parties. It would be a harsh rule to permit one claimant, who claims by allegation under the client, to seal the lips of an attorney who is the sole repository of the evidence as to the basic merits of the claim as against another equally claiming under the client. The client, tho deceased at the time, must be presumed to have consented that under such a state of circumstances the attorney should speak, even tho communications which would have been confidential and privileged during the lifetime of the client and under other circumstances, are thereby divulged. Thus an attorney has been permitted to testify in an inquiry to ascertain as between devisees under the client's will and a grantee claiming under a deed from the client made after the will, as to what was intended by the deed."

So far as consideration is concerned, Margaret signed

the deed freely and voluntarily so as to be relieved from her responsibility of caring for Wilmer, and for a consideration of \$500.00. That disposes of her statutory one-third interest which she is claiming as Wilmer's widow. As to the remaining two-thirds interest which she is claiming as administratrix of Wilmer's estate, Wilmer had a right to dispose of that by will to someone other than Margaret or to deed it to anyone without her consent. He did dispose of such interest for a consideration that in his judgment was equitable and fair, and for a consideration which we will show later is legal and recognized as consonant with public policy. The administratrix is in no better position than Wilmer Webb, and what would not be hearsay as to Wilmer would not be hearsay as to her. If Wilmer were alive, testimony by the plaintiffs that they agreed to his proposition and so advised his attorney and representative would be admissible. Would Wilmer be permitted to say, after executing and delivering the deed under the arrangements present in this case, and after the plaintiffs paid out for his benefit some two thousand dollars, and assuming plaintiffs were willing, ready and able to continue with their end of the bargain, that plaintiffs could not testify to the arrangement because the arrangement was made with Wilmer's attorney and representative? Such evidence would not be hearsay as to Wilmer and would be admissible against him. And by the same token it is admissible against his administratrix.

Any testimony by Mr. Crafts or anyone else as to statements made by Wilmer in his lifetime concerning the disposition of his property and the fact that he conveyed it to someone else, is admissible, even as against the hearsay rule, after his death. The rule is stated in *Jones on Evidence* (2nd Ed) Vol 3, Sec. 1164; and is set forth in the case of *Stoddard vs. Newhall*, 81 Pac. 666, at page 667, as follows:

Now it has been held over and over again in the analogous case of declarations against pecuniary interest that the declarations of the deceased person may be received not only to prove so much contained in it as is adverse to his pecuniary interest, but to prove collateral facts stated in it, at all events, so far as it relates to the facts which are not foreign to the declaration and may be taken to have formed a substantial part of it.

The declaration of a locator of a mining claim that he had conveyed the property by deed, and had been paid therefor, is an admission against his interest, and admissible after his death. *Scott vs. Crouch*, 24 Utah 377, 67 Pac. 1068.

To the same effect is *Smith vs. Hanson*, 34 Utah 171, 96 Pac. 1087.

Miscellaneous

The appellants take the position also that a conveyance made for support and maintenance, or a contract or agreement to convey in consideration of future support

and maintenance, is against public policy and not based upon a valuable consideration; and that there is a presumption that such a contract is not fairly made.

We find no case in Utah on this direct proposition but other jurisdictions have passed squarely on it and have held that a deed given under such circumstances is supported by a good and sufficient consideration.

Where an old lady granted her realty, worth \$40,000.00 or more, reserving a life estate to herself, to her intimate friend, who covenanted fully to support and maintain the grantor, the conveyance was supported by consideration. *Rogers vs. Scott*, 151, Pac. 379 (Cal).

Conveyance by aged and invalid man in return for care and support for remainder of his life, made at time when it was possible that he might live for years, and when grantee was required to give up employment to care for grantor, held supported by sufficient consideration, tho grantor died within short time. *Johnson vs. Studley, et ux.*, 252 Pac. 638 (Cal).

And in the *Johnson vs. Studley* case, supra, the California Court made this observation, (252 Pac. 638 at page 647):

The matter of the consideration for a grant or the assignment of property is, in conceivable cases, of controlling importance, particularly where the consideration appears to be grossly inadequate. This declaration has peculiar application to suits in equity for the enforcement of executory agreements

for the sale of real property. But in such cases, as in actions like the one before us, "the sufficiency of the purported or claimed consideration for a contract of the character under discussion must be determined from the facts of the transaction as they existed when the contract was made, rather than by subsequent developments."

"The sufficiency of a purported consideration for a contract must be determined from the facts of the transaction as they existed when the contract was made rather than by subsequent developments."
Long Beach Drug Co. vs. United Drug Co., 88 Pac. (2nd) 698, at page 701.

The instant case is not one involving the rights of a husband and wife, as between themselves, or one where a husband has made a property settlement with the wife or has procured some post-marital agreement or made a settlement with the wife in anticipation of a divorce, and cases dealing with the above subjects are not applicable. The evidence in the case at bar is to the effect that Margaret refused to stay with Wilmer and take care of him, but was perfectly willing to execute the deed and accept \$500.00 and let Wilmer's brothers and their wives assume the personal responsibility of caring for an invalid, besides assuming the responsibility of paying all expenses in the years to come. Had Wilmer lived for several years and a goodly part or all of the assets which he turned to his brothers been used up in payment of hospital bills, doctor bills, medicines and other expenses, Margaret would have felt she made a good bargain, and it was a good rid-

dance. The court found that Margaret knew she was executing a deed for the home as well as other realty and that she did not intend to live in or use the home after May of 1946, that she was informed as to the kind of property owned by her husband and had some idea of its value. There is no evidence whatsoever, outside Margaret's own bald statement, that any advantage was taken of her. As a matter of fact Mr. Crafts went out of his way to explain to her the nature of the transaction and to advise her to consult someone respecting the execution of the deed. Even though she stated she did not want anything out of Wilmer's estate, Crafts practically insisted that she take \$500.00. The cases and authorities cited by appellants concerning future support, right to maintenance or alimony, etc., have no application in the instant case.

Proof Does Not Show Right to Further Accounting

Respondents agree with the appellants that the pleadings establish the fact that prior to March, 1946, there was a partnership between Wilmer Webb and the plaintiffs and that by mutual consent the partnership was dissolved. But we cannot agree with appellants that they are entitled to any accounting for the property described in the deed and bill of sale, or for any bonds or other property turned over to the plaintiffs by Wilmer. As a matter of fact the record discloses that the defendants were permitted by the court to go into the matter of an accounting

exhaustively, and many exhibits and much proof was introduced by the defendants attempting to establish that the plaintiffs came into possession of a considerable amount of partnership property not included in the bill of sale.

When the defendants rested their main case, and after going fully into the so-called partnership matters, they "reserved the question on account," (Tr. 272). Then, later, when the defendants concluded their surrebuttal, the following proceedings appear (Tr. 350 which is page 263 of the reporter's transcript):

THE COURT: Do you rest?

MR. JENSEN: There are these questions, your Honor, that deal with the partnership, and these cattle and these papers we have asked that they have produced to aid the court in determining the necessity of an accounting.

(Discussion).

THE COURT: Is it agreeable to both sides that the case be disposed of as to the issues, except as to the issues as to whether there should be an accounting had by the plaintiff to the defendant as administratrix?

MR. CLINE: It is agreeable with us, your Honor.

THE COURT: Is it agreeable to the defendants that the issues exclusive of the demand for an accounting be disposed of at this time, and that the case be left open for

the court to decide whether there should be an accounting, and if so, when to take further evidence?

MR. JENSEN: I think that would be true as to the specially described property.

(Discussion).

THE COURT: Are you willing to submit the case exclusive of the issue as to whether an accounting should be required?

MR. JENSENS Yes.

THE COURT: And then either argue it on that issue later or reopen for further evidence on either side if you see fit to put in evidence.

MR. JENSENS Yes.

THE COURT: You may proceed to argue the case.

We have no quarrel with the law quoted by appellants in their brief at pages 102 and 103 thereof concerning an accounting as between a partner and the legal representative of a deceased partner. In this case the partners themselves, during their lifetime, dissolved the partnership, and when Wilmer passed away there was no partnership.

Appellants state that the deed and bill of sale do not purport to transfer Wilmer's right to payment for the property therein described, nor to his cash, water stock, bonds, accounts receivable, etc. Of course the deed and

bill of sale do not on their face purport to transfer Wilmer's right to payment for the property. But the record itself shows the consideration for the conveyances. The record shows that Wilmer, with Margaret's full knowledge and consent, was turning all of his property to the plaintiffs in consideration of maintenance and support and the payment of his outstanding hospital, doctor and other indebtedness. The record shows that Wilmer transferred title to his car to the plaintiffs about the same time as he signed the bill of sale, and that he turned his bonds to them and they took possession of the bonds under the same arrangement.

The bill of sale covers all of Wilmer's right, title and interest in *all* machinery and equipment of every kind, nature and description owned by Webb Brothers. It also covers *all other* livestock owned by him or in which he had an equity. The court found that such disposition disposed of any right to an accounting insofar as livestock, including cattle and pigs, and machinery was concerned. Defendants were clearly not entitled to any accounting for bonds or property that Wilmer conveyed to the plaintiffs in accordance with the agreement for support and maintenance, etc. While the defendants contended that the water stock was personal property, yet the deed conveyed not only the realty but all appurtenant water rights, however evidenced.

The defendants were permitted to go fully into the

matter of the partnership assets. They called witnesses of their own. They examined the plaintiffs. They introduced numerous exhibits. Nothing was uncovered by the defendants showing that the plaintiffs had done away with or appropriated to their own use property which properly belonged to the estate of Wilmer Webb. Defendants, in their brief, have not indicated or suggested wherein they are entitled to an accounting. They have not pointed out wherein they were prevented by the court from presenting any further or additional proof to show their right to an accounting. It is not sufficient to merely allege in a pleading that the litigant is entitled to an accounting in order to require the court to order an accounting. The person asserting such right is required to produce competent and sufficient evidence showing a right to an accounting, and to produce competent and sufficient evidence thereafter that there are assets and properties to which he is entitled.

Plaintiffs and defendants agreed, at the conclusion of the trial, that the issues, exclusive of the demand for an accounting, be disposed of immediately, and that the case be left open for the court to decide whether there should be an accounting and if so, when to take further evidence, (Tr. 351). While the record is silent as to any further proceedings in court, yet finding No. 19 (Tr. 56), recites as follows:

“That it was stipulated in open court by coun-

sel for the plaintiffs and counsel for the defendants that the defendant Margaret Webb, as administratrix of the Estate of Wilmer Webb, deceased, was entitled to, and should have delivered to her one thirty-two caliber Special Winchester Rifle and case, one pair of field glasses and one wrist watch in the event the wrist watch is located by either of the plaintiffs, and that there should be paid to her as such administratrix the sum of \$90.00, being one-third of the value of one hundred bushels of grain, an additional sum of \$90.00 being the equity of Wilmer Webb in \$270.00 of partnership assets paid to plaintiffs for feed pellets, and the additional sum of \$141.00 being the equity of Wilmer Webb in \$423.00 of partnership assets paid to plaintiffs for alfalfa seed, and the court finds, pursuant to the said stipulation that the foregoing property and foregoing sums of money are assets of the estate of Wilmer Webb and in the possession of said plaintiffs.”

This indicates that the parties stipulated to whatever assets might be due the administratrix of Wilmer’s estate. In the light of this stipulation it seems to the respondents that the burden of showing any right to additional or further moneys or assets is on the defendants, and this Court cannot assume that the stipulation does not cover and was not intended to cover a complete settlement between the parties; or at least this Court cannot assume that the defendants, since the conclusion of the trial, have discovered any further proof to submit to the court.

Moreover, the court did not shut the door on the mat-

ter of an accounting and did not preclude the defendants from again litigating that issue, as is shown by Conclusion of Law No. 7, (Tr. 58) as follows:

“That the defendant is not entitled to any accounting upon the evidence as produced in the trial of said cause, but the right to an accounting should be at this time and in this cause rejected and denied without prejudice to the right of defendant to apply for an accounting hereafter, if she be so advised.”

A similar provision appears in the decree in paragraph 6 thereof, (Tr. 60).

The record shows the trial was concluded on September 6th, 1947. The findings and conclusions and decree were signed on February 2nd, 1948, some four months later. The files show a notice directed to the defendants on December 10th, 1947, that on December 15th, 1947, the plaintiffs would call up for determination the matter of the proposed findings, conclusions and decree submitted by the plaintiffs, (Tr. 48). The files also show that on December 10th, 1947, the court made an order that December 29th, 1947, was the time fixed for hearing plaintiffs' proposed findings and conclusions and that the defendants have until December 22nd within which to prepare, serve and file objections thereto (Tr. 50). No objections were filed or proposed by defendants to the finding or conclusion or to the provision in the decree that the right to an accounting should be “at this time and in this cause rejected and denied without prejudice to the right of de-

fendant to apply for an accounting hereafter, if she be so advised."

The record fails to show that at any time between September 6th, when the trial was concluded and for some four months later when the proposed findings, conclusions and decree were actually signed, did the defendants request leave to present further proof on the issue of an accounting. On the contrary the findings show that the parties stipulated to certain items of property and moneys which should be turned to the administratrix. In the absence of a showing by the defendants that they asked leave to introduce further proof, defendants should not now be heard to complain concerning the court's action in rejecting an accounting as an issue, but without prejudice to their right to pursue the matter further if they be so advised. It is true, that as a general rule, a court must dispose of all of the issues presented by the pleadings and proof. This the court did on the record made by the defendants. Defendants failed to proffer further proof or even request more time within which to do so, and the trial court probably went farther in protecting the rights of the defendants than it was required to do, when the accounting matter and issue was disposed of without prejudice to the right of defendants to apply for an accounting hereafter.

We submit, therefore, that the decree of the trial court should be affirmed in its entirety.

Respectfully submitted,

CLINE, WILSON & CLINE,
Attorneys for Respondents.