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Narvol Johnson and LaFaun J. Fleming v. Calvin C. Johnson and Anna R. Johnson : Brief of Defendants and Appellants

Utah Supreme Court

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IN THE SUPREME COURT OF THE
STATE OF UTAH

FILED

29 1958

NARVOL JOHNSON and LaFAUN J.
FLEMING, as the Guardians of
the Person and Estate of ARTHUR
JOHNSON, an Incompetent,

Plaintiffs and Respondents

vs.

CALVIN C. JOHNSON and ANNA R.
JOHNSON, his wife,

Defendants and Appellants

Case No.

8888

BRIEF OF DEFENDANTS AND APPELLANTS

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STATEMENT OF FACTS

Arthur Johnson and Carrie Johnson were husband and wife and residents of Kanab, Kane County, Utah, and during the lifetime of Carrie Johnson, who died July 19, 1958, the husband and wife acquired property on Center Street in Kanab consisting of rental property, -- pool room, service station, store and other rental units (Tr. 14-16,

130-131, 181-182). The Johnsons had three children, Narvel Arthur Johnson, one of the plaintiffs above named, LaFaun Johnson Fleming, one of the Plaintiffs above named and Calvin C. Johnson, the youngest of the Johnson children, who is one of the defendants herein named.

Prior to the death of Carrie Johnson the Johnsons, husband and wife, had carried on a grocery business in property owned by them, and Mrs. Carrie Johnson looked after the grocery business to quite an extent while her husband had other interests such as field property and cattle and ranch, and spent part of his time looking after those interests. After the death of Arthur Johnson's wife, Carrie, Arthur Johnson looked after the grocery business most of the time, --part of the time he had someone employed to help and at times his son Calvin would help in the store. (Tr. 26-27)

Arthur Johnson was having some physical troubles, two prostate operations in 1953, some eye trouble necessitating two operations in Salt Lake City in 1955, and during this time he was troubled with hypertension or high blood pressure. These troubles necessitated him spending some time in the hospital at various times, and since January 1957, he has been in the Kane County Hospital continuously due to the progression of the hypertension which necessitated medical treatment and care, (Tr 38, 252, 276).

On the 20th day of July, 1955, the said Arthur Johnson conveyed by Warranty Deed to his son, Calvin C. Johnson, what is called and referred to as the field land south of Kanab, Utah. The deed was prepared by Patrick H. Fenton, an attorney of Cedar City, Utah, who had conferred with the said Arthur Johnson several times and for extended period of time relative to said

conveyance. (Ex 7) (Tr 502-505)

After the execution of said conveyance, Calvin Johnson was called to the place of business of said Arthur Johnson, and there, in the presence of Attorney Fenton, the Warranty Deed was delivered to the said Calvin Johnson. At the time of delivery of said conveyance Arthur Johnson stated in the presence of Calvin Johnson and Attorney Fenton, that, speaking to Calvin Johnson, "You have paid for this property" or words to that effect.

Prior to the 20th day of May, 1956, Attorney Fenton had several conferences with Arthur Johnson at his place of business in Kanab; also had some conversation with Calvin C. Johnson relative to the property on Center Street in Kanab, and on May 20, 1956, at Kanab, Utah, Arthur Johnson, in the presence of Attorney Fenton executed the conveyance of the Center Street property

(Plff Ex. 1), which property is fully described in Plaintiffs' complaint, and delivered said Deed of conveyance to the said Calvin Johnson. At the same time, Arthur Johnson and Calvin Johnson entered into a written agreement of sale of the property, (Plff. Ex. 2), and on the same day Arthur Johnson executed a Will (Plff. Ex. 6), the execution thereof being witnessed by Attorney Patrick H. Fenton and his wife, who subscribed to said Will as witnesses. (Tr. 505-507, 517-520)

Thereafter, on July 27, 1957, Marvel A. Johnson and LaFaun J. Fleming, the plaintiffs herein as Guardians, filed a petition for appointment of guardians of Arthur Johnson in which they alleged that he was incompetent, and requested the Honorable John L. Sevy, Jr., District Judge of the Sixth Judicial District, in and for Kane County, to appoint them as Guardians

of his Estate. A hearing was had thereon on the 6th day of August, 1957, and an Order was made by the Court appointing the said Marvel A. Johnson and LaFaun J. Fleming Guardians of the said Arthur Johnson, an incompetent.

After the appointment of said guardians, Calvin Johnson, the owner of the Center Street property, by virtue of the conveyance heretofore referred to, and also the owner of the field property by virtue of the conveyance of the same as referred to above, continued to work the fields and continued to collect rentals from the rental units on the Center Street property except the Service Station which was being operated by the said Marvel A. Johnson. There is evidence that the various rental units were being rented as follows:

Drug Store	per month	\$100.00
Snack Bar	per month	75.00
Gift Shop	per month	80.00
Pool Hall	per month	200.00
Grocery Store	per month	80.00
Clothing Store	per month	100.00

(Tr. 130-131, 181-182)

After the conveyance of said property to Calvin C. Johnson, he mortgaged the same for the construction of what is called the "Dairy Queen" and he rented that property for \$300.00 per month. There is some conflict as to the value of the property at the time of conveyance to Calvin C. Johnson, but the sale price to him was \$50,000.00 for all of the Center property (Plff Ex. 2)

On October 5, 1957, Narvel A. Johnson and LaFaun J. Fleming as Guardians of the person and estate of Arthur Johnson, an incompetent, filed a complaint against Calvin C. Johnson and Anna R. Johnson, as Defendants, alleging that Arthur Johnson, for three years prior to the filing of said action, had been in ill health, unable to look after his business affairs and alleging that the said Calvin C. Johnson had taken upon himself the operation of the business

of Arthur Johnson and alleging that since 1955 Arthur Johnson had not been mentally competent to handle and manage his affairs and that on or about the 20th day of May, 1956, while Arthur Johnson was in a weakened mental and physical condition, Calvin C. Johnson by fraud and wrongful scheming and design, and without adequate consideration and by fraudulent pretenses, induced Arthur Johnson to convey the Center Street property to him. (See Complaint)

Plaintiffs further allege that at said time Calvin C. Johnson, by artful conduct, blandishments, false pretenses and coercion, exerted undue influence upon said Arthur Johnson and induced him to sign the agreement of sale, (Plff Ex. 2).

Plaintiffs further allege that on the 20th day of May, 1956 when the said Arthur Johnson was mentally incompetent and under the coercion and undue influence of the

defendant Calvin C. Johnson, he was induced to execute a Will called the last Will and Testament of the said Arthur Johnson, which Will they prayed be declared null and void and of no force and effect, and also said Agreement be declared and adjudged null and void and of no force and effect, and that the Warranty Deed be declared and adjudged null and void and of no force and effect and that the title of Arthur Johnson to all of said real, person and mixed property described in said complaint be quieted in the plaintiffs as Guardians. (See Complaint)

Defendants by their answer denied all the material allegations of said complaint relating to coercion, undue influence and incompetency of the said Arthur Johnson.
(Defts. Answer)

Thereafter, and after the defendant, Calvin C. Johnson, had recorded the deed to the property known as the field property,

which was done January 16, 1958, the plaintiffs filed an amended complaint alleging that the said Arthur Johnson was incompetent at the time of the conveyance of said field property (Ex 7) on July 20, 1955, and alleging that the said Calvin C. Johnson, by artful conduct, blandishments, false and fraudulent pretenses, undue influence, wrongful scheme and coercion induced said Arthur Johnson to execute said conveyance to said field land. (See Amended Complaint)

All of which said allegations were denied by the defendants in their answer to said Amended Complaint. (See Answer to Amended Complaint)

The issues being joined and the matter ready for trial, defendants made a demand for a jury to hear said case, and paid the jury fee. March 4, 1958, at 2:00 o'clock p.m., the demand for jury was heard, the

Plaintiffs objected to a jury on the ground that the issues were equitable. A jury was denied and the case set for trial on March 17, 1958, at 10:00 O'clock a.m. (See minute entry).

After the death of Arthur Johnson's wife, on July 19, 1953, Arthur Johnson lived at the store he was operating and at his own home until he sold the store in February, 1956, after which he stayed in his own home part of the time and at Marvel Johnson's part of the time and he spent some time with his daughter in Midvale, Utah. Particularly after the sale of the store in February, 1956, Marvel and his wife, Della, looked after Arthur Johnson, had him at their home considerable of the time and fed him his meals much of the time. During part of that time he was under medical care for hypertension and other troubles and there were several periods of

time that he spent in the hospital, in April 1956, May, 1956, June, 1956 and since January 1957 he has been in the hospital continuously for medical treatment. (Tr. 28-41, 80-84, 168-176)

Dr. Fulstow treated Arthur Johnson for hypertension and other troubles at the home and at the hospital (Tr 52-53) and at times Arthur Johnson was disoriented which is not uncommon in hypertension cases (Tr.82). He did have a mild stroke on June 23, 1956, which was the first stroke that he had had (Tr 80-81), but has had several since that time. There was no medical evidence of mental disturbance in April and May, 1956, (Tr 83), but since June 1956, he has been confused, needed help to take care of his affairs and since January 1957 has been incompetent, but that his mental illness and incompetency was not questioned until after May 1956. (Tr. 83-84)

In March or February, 1956, Arthur Johnson was in Salt Lake City and visited his brother, Vern Johnson. He stayed at a hotel where he would be closer to the eye-specialist. He didn't want to stay at his daughter LaFaun's at Midvale because of the noise and confusion of the children. At times he was confused, at times he knew what he was doing, he wrote checks and took care of other matters (Tr. 108).

In 1955 Vern Johnson talked to his brother, Arthur Johnson, told him he ought to get his property fixed up and he, Arthur, said he was going to have it divided three ways and later on he told Vern he had it fixed up and it was over in Cedar City in Fenton's hands and he said that a deed had been fixed up at the same time. At one time Arthur Johnson told Vern Johnson that he was worried about Fred Fleming, LaFaun's husband, getting his property for fear that

he would spend it and he also said that Narvol would spend it too. (Tr. 109, 117-118)

On July 3, 1955, Arthur Johnson went to J. M. Meeks, his bishop in Kanab, Utah, and got a recommend to go through the Temple and he also got a recommend on January 15, 1956, to go in the Temple, after which he told the Bishop that he felt very good about it. (Tr. 405-407, 415-416)

In the latter part of 1956, while Arthur Johnson was spending considerable time at Narvol Johnson's at or near the service station, the matter of a new pump and canopy for the station was discussed between Arthur and Narvol Johnson and Arthur Johnson advised and told Norval Johnson to get the new pump and pay for the same out of rentals. (Tr. 153-155, 211-212)

Arthur Johnson spent some time, nearly every month of 1955, at the home of his daughter, LaFaun in Midvale, Utah, (Tr. 254) and was at her home in February, 1956,

where he had gone to participate in some tour (Tr. 255, 280), but he stayed at the Hotel for about a week in February, 1956, (Tr. 281) and he went through the Temple in Salt Lake City in the latter part of 1956, and in September and October he was at her home for about a month, many checks were made out and signed by Arthur Johnson for various sums of money (Tr. 257, 286-287).

On July 1, 1955, Arthur Johnson and Martiner Jones and his wife executed a lease upon the drug store owned by Arthur Johnson, the said lease had been discussed prior to that time by the parties. (Tr. 382, 392).

In the fall of 1955, Sylvan W. Johnson negotiated with Arthur Johnson for the sale of the grocery store business and the rental of the store. Negotiations went on for a month or two and then in January and February stock was taken, lease signed and Sylvan Johnson went into the operation of the store.

(Tr. 430-437). Before Arthur Johnson moved out of the store into his own home, he negotiated with one John K. Little for the digging a cesspool which work was done for the said Arthur Johnson and paid for by him. (Tr. 481-493)

Some time prior to the sale of the store to Sylvan Johnson, Arthur Johnson employed one Joel Johnson to help him in the store. (Tr. 550).

On or about June 1, 1956, G. C. Bonham negotiated a lease of the clothing store from Arthur Johnson, said negotiations being with Arthur Johnson and the lease being negotiated with Arthur Johnson and Calvin Johnson at that time. (Tr. 556-560)

POINTS RELIED UPON

POINT NO. I.

THE TRIAL COURT ERRED IN DENYING THE DEFENDANTS AND APPELLANTS THE RIGHT OF TRIAL BY JURY.

POINT NO. II.

THE COURT ERRED IN ITS FINDINGS OF FACT #5 THAT THE DEFENDANT CALVIN C. JOHNSON DOMINATED THE SAID ARTHUR JOHNSON OR OVERSAW MOST OF HIS BUSINESS AFFAIRS OR THAT THE SAID ARTHUR JOHNSON REPOSED SPECIAL TRUST AND CONFIDENCE IN SAID DEFENDANT.

POINT NO. III.

THE COURT ERRED IN ITS FINDINGS OF FACT NOS. 6 and 7 FOR THE REASON THAT THE SAME IS CONTRARY TO AND NOT SUPPORTED BY THE EVIDENCE OR PLEADINGS AND IS CONTRARY TO THE FACTS.

POINT NO. IV:

THAT THE COURT ERRED IN ITS FINDING OF FACT NO. 8 THAT CALVIN C. JOHNSON OPERATED ARTHUR JOHNSON'S BUSINESS AS HE SAW FIT FOR THE REASON THAT THE SAME IS CONTRARY TO THE EVIDENCE.

POINT NO. V:

THAT THE COURT ERRED IN ITS FINDINGS OF FACT NOS. 9, 10, 14, 15, 16 and 17 FOR THE REASON THAT THE SAME IS CONTRARY TO AND NOT SUPPORTED BY THE EVIDENCE.

POINT NO. VI:

THAT THE COURT ERRED IN ITS CONCLUSIONS OF LAW NOS. 1, 2, 3, 4, 5, 6, 7, 8, 9, 10 and 11 AND THE WHOLE THEREOF FOR THE REASON THAT THE SAME IS CONTRARY TO AND NOT SUPPORTED BY THE EVIDENCE.

POINT NO. VII:

THAT THE COURT ERRED IN ITS JUDGMENT AND DECREE IN DETERMINING THAT THE DEEDS,

CONTRACT OF SALE AND THE WILL REFERRED TO
IN THE PLEADINGS WERE NULL AND VOID.

ARGUMENT

POINT NO. I.

The Trial Court erred in denying the
defendants' and appellants' demand for trial
by jury.

Paragraph 17 of plaintiffs' and res-
pondents' complaint asks that the Will of
Arthur Johnson (Ex. No. 14) be declared null
and void on the ground of coercion and undue
influence by Calvin C. Johnson and in-
competence of the testator.

That the contest of a Will upon the above
ground is a law case has been declared by
the Utah Supreme Court many times:

"A Will case is a Law case,--"
re: George's Estate 112 Pac 2d,
498

"A Will case being a Law case,--"
Re: Buttars' Estate, 261 Pac 2d,
171

"A contest over validity of a Will
is an action at Law rather than in

equity,--"

In re, Lavelle's Estate
248 Pac 2d, 372

Defendants and appellants were entitled to have the issues raised by the plaintiffs' complaint regarding the Will tried by jury, unless the joining of the law case with the equitable issues raised by plaintiffs' and respondents' pleadings with reference to deed and contract would justify the court in denying the jury. It is agreed that the allegations of incompetency, coercion, undue influence, etc. raised with reference to the deeds to the field property and the execution of the contract are equitable issues.

Where legal and equitable remedies are sought in the same action, the court held in Norback vs. Board of Directors of Church Extension SOC, 37 Pac 2d 345 (Utah):

"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."

In *Valley Mortuary vs. Fairbanks* reported in 225 Pac 2d, 739 (Utah), the Court held as follows:

Section 8: "Likewise, in actions in this state in which the plaintiff unites in his complaint two complete causes of action, in one of which he seeks equitable relief and legal relief in the other, sound reasoning compels us to the conclusion that the rule adopted by the Supreme Court of California in *Pacific Western Oil Co. v. Bern Oil Co.*, supra (13 Cal. 2d. 60, 87 P.2d 1045) should be observed in this state. That is, a jury trial should be accorded the parties on the issues of fact raised in the legal cause of action."

And in Section 9 of said case, after a discussion of the rule in the *Norback* case set forth above, the Court held as follows:

"Appraised in the light of the California rule, the *Norback* case is apparently correct in result, but the rule there laid down as to when litigants are entitled to a trial by jury, which we have quoted above, cannot be reconciled with the California rule

which we have approved and adopted in this opinion. There may be certain type of cases, although none occur to us now, in which the issues of fact in the legal cause of action are so intertwined with the issues of fact in the equitable cause of action that they cannot be separated for the purpose of trial by jury. Only then would it seem that the court should determine whether the major issue or issues are legal or equitable and grant or deny a jury trial accordingly. Otherwise the parties should be entitled to a jury trial on the issues of fact in the legal cause of action."

POINTS NO. II TO VII INC.

The matters raised by these point are so inter-related as to testimony and the pleadings that to discuss each point separately would of necessity be repetitions and confusing.

The discussion concerns the allegations in the Complaint and the Findings and Conclusions as to undue influence, fraudulent and wrongful scheme and design on the part of Calvin C. Johnson, one of the defendants, and the mental incompetence of Arthur Johnson at the time of the execution of deeds,

contract and the Will referred to in the pleadings and exhibits herein.

The deed to the field property was executed on July 20, 1955 (Ex 7) and the question is, "Was Arthur Johnson at that time mentally incompetent? Did his son Calvin C. Johnson use undue influence to procure the execution of the same and did he practice fraud and wrongful scheme upon Arthur Johnson to procure the execution of the said deed?" In *Anderson v. Thomas*, 159 P.2d, 142 (Utah) the Court said,

"The plaintiff must do more than merely raise a suspicion. There must be some affirmative evidence to show that Richard did exercise a dominating influence over this mother and thus induced her to part with her property---"

And quoting further from said case as to mental capacity:

"In determining whether or not the grantor had sufficient mental capacity to execute a deed, the focal point of the inquiry is the condition of the grantor's mind at the

time of the execution of the deed. Less weight is given to remote transactions and conversations."

"The test for determining whether a person had mental capacity to contract was stated as follows by this court in Hatch v. Hatch, 46 Utah 218, 148 P. 433, 438: 'In ordinary contracts the test is, Were the mental facilities so deficient or impaired that there was not sufficient power to comprehend the subject of the contract, its nature and its probable consequences, and to act with discretion in relation thereto, or with relation to the ordinary affairs of life?' We see no reason why the same test should not apply to determine whether or not a grantor has sufficient mental capacity to make a deed."

Dr. Fulstow testified that he had treated Arthur Johnson for some time and as a matter of fact he was still under Dr. Fulstow's care at the hospital at the time of the trial of the case, but Dr. Fulstow testified that there was nothing in his treatment of Arthur Johnson prior to May 20, 1956, that caused him to question his ability to attend to business or was it

called to his attention of any mental sickness or lack of ability.

On July 1, 1955, Arthur Johnson discussed a lease of the Drug Store with Martiner Jones and his wife Nellif F. Jones. Discussions were had a few times prior to the time of the execution of the same and both of them testified that he appeared to be mentally competent and that there was nothing, during that time, in the actions of Arthur Johnson or in his conversation that caused them to question his mental facilities.

Frank Farnsworth, an old time friend of Arthur Johnson, knew him all his lifetime and had visited him quite often and had seen him frequently except for the short time when Farnsworth was in Nevada. He returned, however, in 1954 and saw Arthur Johnson very often after that time at the pool room and at the store, and during 1955

and 1956 particularly, he stated that there was nothing in his conversations with Arthur Johnson or any of the circumstances under which they met that would lead him to believe that he was not in his right mind and did not have his mental facilities.

J. M. Meeks, Arthur Johnson's Bishop, told of frequent visits to see Mr. Johnson, especially after the death of his wife in 1953, and that on July 3, 1955, he discussed with him and issued to him a recommend to go in the temple; and that on January 15, 1956, Mr. Meeks, as the Bishop of Arthur Johnson, issued another recommend to him to go through the temple. This was after a discussion with Arthur Johnson about the matter. Bishop Meeks testified that Arthur Johnson looked well and expressed himself as feeling fine. That, before the recommend was issued on July 3, 1955, Bishop Meeks questioned him regarding his tithing,

word of wisdom and other matters and his answers being satisfactory the recommend was issued; and Arthur Johnson later told the Bishop that he was glad that he got the recommend and had the opportunity to go through the temple and do work in the temple and that he felt fine about it.

William J. Mackleprange testifying for the plaintiffs stated that he had known Arthur Johnson for many years; that he had done business with him in the store, gave him a check on July 2, 1955, Ex. 3, that they traded back and forth in 1955 as he had an account at the Center Store operated by Arthur Johnson, that Arthur Johnson acted all right to him and he noticed nothing abnormal about him.

Patrick H. Fenton, testified that he is a practicing attorney in Cedar City, Utah, and had known Arthur Johnson for many years, even prior to the time he started

to practice law. That he prepared the Warranty Deed to the field property dated July 20, 1955, Ex. No. 7; that he acknowledged it and also signed it as an attesting witness. That the same was signed or executed by Mr. Arthur Johnson in Kanab in the rear of the grocery store and that after the execution thereof Calvin Johnson was sent for and that Arthur Johnson delivered the deed to Calvin Johnson. Arthur Johnson said to Calvin Johnson, when the deed was handed to him, "Here's the deed to the field, you know it has been paid for." Only Arthur Johnson and Mr. Fenton were present when the deed was drawn up and Arthur Johnson gave him the information necessary to draw said instrument, and Mr. Fenton stated that on the 20th day of July, 1955, he discussed business matters with Arthur Johnson relative to the execution of the deed to the field and there was nothing in the transactions that occurred or the

attendent conversations that would lead Mr. Fenton to believe that he, Arthur Johnson, was not at the time in possession of his mental facilities.

The other three instruments questioned in the present case, to-wit: The Deed, (Ex. No. 1) Contract (Ex. No. 2), and the Will, Ex. No. 14) were all executed on the same day, May 20, 1956, under conditions, so alleged by plaintiffs and set forth in the Findings and Conclusions, of undue influence by Calvin C. Johnson, the incapacity and incompetence of Arthur Johnson and by means of fraud, wrongful schemes and designs practiced upon said Arthur Johnson by the said Calvin C. Johnson.

First let us discuss the Will (Ex. No. 14).

The Will was executed on May 20, 1956, and witnessed by Patrick H. Fenton, the attorney who prepared the same, and his wife, Gloria G. Fenton, who are residents of

Cedar City, Utah. The Will was executed at Kanab, Utah, at the home of Calvin C. Johnson shortly after Arthur Johnson had returned from the hospital where he had been under treatment for a respiratory infection since the 17th of May, 1956.

Attorney Fenton testified that on the 20th of May, 1956, at the time the Will and other instruments were executed by Arthur Johnson that he was with Arthur Johnson one and half to two hours discussing the various instruments, said instruments having been prepared some time prior thereto under the direction of Arthur Johnson, and Attorney Fenton testified that there was nothing in Arthur Johnson's actions and nothing in his conversation or the circumstances surrounding the execution of the instruments that indicated that he was not in possession of his mental facilities.

As for the Will, it in and of itself shows conclusively there was no undue

influence, no fraud, no scheme on the part of Calvin C. Johnson to induce his father to execute the Will in favor of himself and against the plaintiffs because the Will by its own terms bequeaths any property belonging to the testator at his death to the three children equally. The only advantage that Calvin C. Johnson has with respect to the Will is the fact that he was named therein as executor to act without bond, and certainly his father would have the right to appoint him executor if he desired. If there had been a scheme on Calvin C. Johnson's part to get all of the property belonging to his father for himself alone, and the Will so indicated, there might be some substance to the allegations of the complaint and the Findings of Fact and Conclusion of Law; but standing alone the Will itself testifies to the competency of Arthur Johnson and to the fact that there

was no undue influence practiced upon him in the execution of the same.

Even though Arthur Johnson was aged, was in ill health, had been in the hospital at various times for various ailments, had been disoriented at times through hypertension and other ailments, they do not of themselves prove the incompetency of Arthur Johnson at the time the Will was executed and there is no evidence of his incompetency at that time or at the time of the execution of the other instruments except the general statement of the two plaintiffs, who declared him incompetent at all times except at times when it served their convenience to have him write checks for them or agree to some business proposition advantageous to them.

The Deed to the Center Street property, (Ex. No. 1) and the Contract for the sale of the Center Street property from Arthur Johnson to Calvin C. Johnson, (Ex. No. 2)

were executed on the 20th day of May, 1956, at the home of Calvin C. Johnson and in the presence of Attorney Patrick H. Fenton, who had spent considerable time in preparation of the same and who had conferred with Arthur Johnson several times prior to that date relative to said agreement and deed. Attorney Fenton testified that at the time of the execution of the Agreement amendments to the same were discussed by Arthur Johnson and himself and that at said time there was nothing in the circumstances surrounding the same or the conversations with Arthur Johnson or his actions that would or did lead Attorney Fenton to question or suspect that Arthur Johnson was not in control of his mental facilities.

The information for the drawing of the deed and contract was given to Attorney Fenton in March and April, some time prior to the execution of the same. These instruments were prepared by Mr. Fenton in

his office after information concerning the same was given to him by Arthur Johnson and Calvin C. Johnson. Attorney Fenton and ^{At}Arthur Johnson had discussed the terms of the contract prior to the time that Calvin Johnson came into the store where Attorney Fenton and ^{At}Arthur Johnson were discussing the matter. Fenton told Calvin at that time that Arthur Johnson desired to sell the property on Center Street to him and Attorney Fenton told him the conditions of the sale and price that Arthur Johnson had put on the property. Calvin Johnson questioned whether or not he could pay for the property under the terms of the plan of sale, but he later said that if that's the way his father wanted them, he would go through with it accordingly.

G. C. Bonham, one of Arthur Johnson's renters, testified that he entered into a lease with Arthur Johnson on June 1, 1956,

that prior to the execution of the lease he had talked to Arthur Johnson about leasing the property and that there was nothing in his actions or in the circumstances or the conversations with him that would lead him to question his ability to enter into a lease or as to his mental facilities. That he was in full possession of his mental facilities.

The burden of proof in matters of this kind is upon the plaintiffs. They must prove the various allegations made upon which they desire relief.

"In accordance with the general rule of evidence, the burden of proof in an action involving a deed rests upon the party alleging the facts constituting his cause of action and he must prove every disputed essential fact."

16 Am Jur Sec 371, P. 649

"Where a deed from a parent to child is attacked on the ground of undue influence, the burden is upon the one alleging the existence of such undue influence to show it."

Id 651, Sec. 374, P.651

"A party asserting undue influence has the burden of proving such influence."

Id 651, Sec. 374 P.651

"A grantor in a deed is presumed to be sane and competent at the time he executed it."

Id Sec. 376, P. 652

"A Deed from a parent to a child alone and of itself raises no presumption of undue influence, especially where it was in consideration of support, since in the absence of evidence to the contrary, the parent is presumably the dominant party. No presumption arises for such relationship although some children are thereby favored to the exclusion of others and although the beneficiary is the adviser of the parent and has the control and management of his affairs. This is true even though the parent is aged or aged and infirm.

16 Am Jur DEEDS, P. 661, Sec. 393

It is true that Arthur Johnson placed

a certain amount of reliance and dependency upon Calvin C. Johnson. That had been going on for many years even when Arthur Johnson's wife was alive. Calvin C. Johnson was apparently a dependable fellow, one who didn't carouse and drink and get into a lot of trouble like Narvol Johnson, one of

the plaintiffs, did, and it is natural that the parents would put a certain amount of dependency upon a child of that kind; but that does not indicate in any way or prove that any undue influence was exercised upon Arthur Johnson by Calvin C. Johnson and there is certainly no evidence of any fraudulent or wrongful scheme and design on Calvin C. Johnson's part to get any of the property by the Deeds, the Contract and the Will involved in this action; and certainly the fact that ^{Ar}Arthur Johnson had been in the hospital and was somewhat weakened does not necessarily imply that he was mentally incompetent at the time of the execution of the instruments in question; and we submit that the plaintiffs have failed to prove any of the allegations of their complaint, and that the Findings of Fact and Conclusions of Law and the Decree and Judgment based thereon were in error.

CONCLUSION

In conclusion we therefore submit that the Judgment appealed from should be reversed, that the instruments in question should be given full force and effect as contemplated by Arthur Johnson.

Respectfully submitted,

PICKETT & PICKETT
Attorneys for Defendants
and Appellants