

1958

# Narvol Johnson and LaFaun J. Fleming v. Calvin C. Johnson and Anna R. Johnson : Brief of Respondents

Utah Supreme Court

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V. Pershing Nelson; Edward W. Clyde; Attorneys for Respondents;

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IN THE SUPREME COURT  
of the  
STATE OF UTAH

FILED  
17 1958

Clerk, Supreme Court, Utah

NARVOL A. JOHNSON and LAFAUN J.  
FLEMING, as the Guardian 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.*

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RESPONDENTS' BRIEF

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V. PERSHING NELSON  
EDWARD W. CLYDE

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# IN THE SUPREME COURT of the STATE OF UTAH

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NARVOL A. JOHNSON and LAFaUN J.  
FLEMING, as the Guardian 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

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## RESPONDENTS' BRIEF

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### NATURE OF THE CASE

The primary parties to this suit are the only children of Arthur Johnson, an incompetent. In a separate contested proceeding, the District Court held on August 13, 1957, that Arthur Johnson was an incompetent. A son, Narvol A. Johnson, and a daughter, LaFaun J. Fleming, were appointed his guardians. They brought this suit against their younger brother, Calvin C. Johnson, on October 5, 1957, to set aside two deeds from the incompetent to Calvin to have a contract of sale and a will declared to be void, and for an accounting.

The case was tried to the court without a jury. The trial court found that since the Spring of 1955, Arthur Johnson has not been "mentally competent and has been physically incapacitated to handle and manage his business and affairs, during a substantial portion of said time." The court also found that the defendant Calvin C. Johnson had procured the deeds of conveyance by fraud and undue influence. The court set aside both deeds and declared the Will and the contract of sale to be void. The court also ordered the defendants to render an itemized account to the court "of all the assets and property" of Arthur Johnson, the incompetent, from the 1st day of January, 1955. From this judgment, the defendants have appealed.

### STATEMENT OF FACTS

The appellants assert as the trial court's only error of law its denial of appellants' request for a jury trial on the issues concerning the validity of the will. Appellants expressly admit on page 19 of their brief that they were not entitled to a jury trial on any other issue. All other assignments of error challenge the sufficiency of the evidence to sustain the trial court's findings. The facts will, therefore, have to be fully set forth in connection with our argument, and for that reason we will not discuss the facts in detail here.

The recitation of the facts by the appellants is incomplete, in that appellants fail to note the evidence supporting the trial court's findings. The basic facts are reflected by the findings. The trial court found that since

the death of the wife of Arthur Johnson on July 16, 1953, Arthur Johnson "has failed to maintain an active interest in his personal and business affairs, and has permitted the defendant Calvin C. Johnson, by default, rather than by express authorization or consent, to oversee most of his business and affairs." (Finding No. 4) During all of the time since the death of his wife, Arthur Johnson has by reason of his relationship to Calvin, "reposed special trust and confidence" in Calvin, and Calvin has obtained and exercised a dominating influence over his father. (Finding No. 7)

For approximately three years preceding the trial, Arthur Johnson has suffered ill health and "infirmities of age, and has undergone a number of serious surgical operations in connection therewith, which have seriously incapacitated him from carrying on his business and pursuits," and Calvin has taken upon himself, particularly since the 1st of January, 1955, "the responsibility and control over the assets and properties of the said Arthur Johnson, and has dealt with, managed and operated said property as he has seen fit." There is no evidence that he has ever accounted to Arthur Johnson with respect thereto. (Finding No. 8) The court further found that since "the early spring of 1955, Arthur Johnson has not been mentally competent and has been physically incapacitated to handle and manage his business and affairs during a substantial portion of said time; that on or about the 20th day of July, 1955, and again on May 20, 1956, and at times when the said Arthur Johnson was

in a weakened mental and physical condition, and deprived of immediate contact with his other children and close relatives and friends, and as a part of a fraudulent and wrongful scheme and design to obtain from him and without adequate consideration therefor, real property of the said Arthur Johnson of a substantial value and comprising farm lands with improvements and water rights” and also valuable business properties. (Findings 9 and 10)

The court further found that Calvin Johnson promptly recorded the warranty deed to the business property, but failed to record the contract of sale; that “there is no evidence in the record of any consideration for said deed (to the business property) having passed” from Calvin to Arthur Johnson at the time the deed was recorded, or at any time since said date. (Findings 11 and 12)

The court also, in Finding No. 14, noted that Calvin had managed the business affairs of Arthur Johnson and had received substantial amounts of property and moneys, for which he had never accounted. The evidence fully sustains these findings.

## ARGUMENT

### I. THE EVIDENCE FULLY SUSTAINS THE TRIAL COURT’S FINDINGS.

- (a) IT HAS BEEN ESTABLISHED UNDER PRINCIPLES OF RES JUDICATA THAT ARTHUR JOHNSON WAS AN INCOMPETENT.



The proceedings in the incompetency hearing were not introduced in evidence, but were referred to on cross-examination of the various witnesses, who had testified at the earlier hearing. It is noted on pages 5 and 6 of appellants' brief that a petition was filed by respondents on July 27, 1957, to have the court declare Arthur Johnson, their father, to be an incompetent. It is also there noted that a hearing was held on August 6, 1957, and that the court granted the petition and declared Arthur Johnson to be an incompetent. This order is dated August 13, 1957. Although this was a contested proceeding opposed by Calvin, no appeal was taken from that order. It has thus become final under principles of *res judicata*, and at least by August 13, 1957, Arthur Johnson was incompetent.

(b) SINCE THE SPRING OF 1955, ARTHUR JOHNSON HAS BEEN MENTALLY INCOMPETENT AND PHYSICALLY INCAPACITATED A SUBSTANTIAL PORTION OF THE TIME.

Arthur Johnson was deeply affected by the death of his wife; it took the pep out of him, and he seemed to lose interest in the active management of his affairs. (R. 120, 35) At the same time, he was suffering from severe hypertension and arteriosclerosis and prostate trouble. (R. 52-3) He had moderate to very severe hypertension as early as 1952, and he did not respond well to treatment. (R. 53) On October 8, 1953, he underwent a serious prostate operation in San Diego, California, and then underwent a similar operation within a matter of weeks thereafter. He was in great pain. (R. 38, 59, 167)

In the latter part of December, 1953, he was again hospitalized for complications arising out of the same trouble, and was released from the hospital in January of 1954. (R. 59) Dr. Fulstow saw him in May of 1954, and checked Mr. Johnson's blood pressure. At this time it was 228 over 144 over 140. A pressure of 135 over 85 was normal. (R. 60) In September, 1955, he complained of "ringing in the head," which would indicate an increase of blood pressure. (R. 60) Taylor Crosby, administrator of Kane County Hospital, testified that Mr. Johnson was hospitalized from April 19th to 23, 1955. (R. 100)

In the Spring of 1955 he underwent his first eye operation in Salt Lake City, and in the early summer of that year was again hospitalized for the same trouble. In the Fall of 1955 he underwent a second eye operation in Salt Lake City, and was under rather constant treatment during the entire Spring, Summer and Fall of that year. (R. 167) He was hospitalized again in December of 1955. During this time, and on December 27, 1955, the hospital records contain a note that: "Patient up demanding coffee (at 2:30 a.m.) up wandering, extremely obnoxious in action." (R. 92)

The illness continued on into the Spring of 1956. Immediately prior to the time (May 20, 1956) when Calvin procured the contract of sale and the deed to the valuable business property in Kanab, Arthur Johnson had undergone an intensive period of serious physical disability. He was suffering from acute high blood pressure

on April 30, 1956. Dr. Fulstow testified that his blood pressure had increased to 286 over 162 over 158. (R. 55) The doctor said this was an extremely high blood pressure and that: "Recorded blood pressures at that amount suggests that a stroke is dangerous, the possibility of a stroke is present."

The doctor on that date administered hypertension medicine and "the patient's response was more marked than is usually seen," and it caused an "excessive drop in blood pressure," and Mr. Johnson fainted. He was immediately hospitalized. (R. 54) The doctor also noted that when extremely high blood pressure is alleviated, there may be damage to the small arteries in the brain, and this could affect the patient's mental processes. (R. 68) Dr. Fulstow further noted that this damage to the small arteries interferes with the nutrition of the brain. (R. 68) He also noted that Mr. Johnson suffered at this same time from "moderately severe" arteriosclerosis. This also would interfere with circulation. (R. 61)

Mr. Johnson was placed in the hospital on April 30th and released May 2, 1956. He was only out of the hospital one day, and then was re-admitted to the hospital on May 3rd, because of a bad nose bleed, which in the opinion of Dr. Fulstow was caused by high blood pressure. (R. 63) Mr. Johnson was released from the hospital again May 6th. The doctor noted that he made an emergency house call to attend Mr. Johnson at noon on May 15th. Mr. Johnson had fainted and was found on the

floor. "His eyes were up in his head and he was drooling at the mouth. He had wet all over his clothes." The family changed his clothing and called the doctor. Mr. Johnson was immediately again placed in the hospital. (R. 171, 100, 64)

During this period of hospitalization, beginning May 15, 1956, and ending May 20th (the date he signed the deed) the hospital records show that Mr. Johnson was out of his bed "wandering" around the hall. The attending nurse noted on the hospital records that Mr. Johnson "apparently does not know where he is. He was up and about and apparently doesn't know where he is." (R. 93) He was released from the hospital on May 20, 1956, and it was on this date—the very day of his release—that Calvin got the deed to the business property and had the contract of sale and will signed. All were executed in Calvin's presence and at Calvin's home. (R. 510, 505, 522, Exs. 1, 2, 14)

In June, 1956, Mr. Johnson had a head cold accompanied by a fainting spell. The doctor said that following this "he showed definite confusion" for a while. These periods of confusion were almost steady. (R. 57) The doctor made a house call on June 8th. Mr. Johnson suffered a stroke on June 23rd and was again hospitalized. (R. 64)

Mr. Johnson was 73 years of age. (R. 49) Running through this entire period of time, he suffered from nose bleeds, (R. 56) He had severe sick headaches. (R. 35) His eye sight was badly impaired. (R. 73) His heart

was enlarged about 100 per cent. (R. 65-6) He was not mentally alert (R. 58) and had little interest in his business. (R. 35) He would lay on a bed in the back of his store, would not wait on customers and would leave his store unlocked. (R. 35, 191) When in Salt Lake, he would think he was in Kanab, (R. 108) and did not know his younger grandchildren. (R. 258) He had to have help shaving and bathing. (R. 254) He did not have control over either his bowels or urine. (R. 254)

He did not know when he had to void, (R. 58) and various witnesses testified that he frequently wet his clothing. (R. 254, 40, 171) According to Dr. Fulstow this would indicate he was "not in full possession of his mental facilities." (R. 58) In October, 1955, he locked himself in a service station restroom, talked irrationally, complained about there being no toilet paper in the restroom, when in fact there was. (R. 172, 39)

Throughout this period of time he had few inhibitions about dress. On various occasions and at various times, beginning as early as 1955, Mr. Johnson would come into the room where adult women were present in various stages of undress, sometimes with only his garments on, and on one occasion without clothing on at all. (R. 35, 175, 176, 252, 377) He had difficulty orienting himself as to time and place. (R. 58, 57)

We submit that from the foregoing evidence, the court properly found that at least since the Spring of 1955 Arthur Johnson was seriously ill and was mentally

and physically incapacitated from attending to his ordinary business affairs.

- (c) SEVERAL WITNESSES TESTIFIED THAT ARTHUR NEEDED HELP WITH HIS BUSINESS AFFAIRS.

William J. Mackelprang testified:

“I think that Carrie kind of took the pep out of him, her death.

“Oh, I think it kind of made a difference in him.” (R. 120)

Dr. Fulstow said:

“A combination of a number of circumstances have resulted in what appears to be interference with his mental function.” (R. 61)

“Q. Now, Dr. Fulstow, from your observation of Mr. Johnson’s condition during the period of your treatment, commencing in April, 1956, and extending through the present time, what would be your opinion as to whether Mr. Johnson was competent during that period to handle his own affairs consistently and without help from someone?

“A. I would be inclined to think that during that period of time he would have need of help in handling his own affairs.” (R. 75)

His brother Vernon Johnson testified that not since 1955 has he “been able to function properly in a business way; that is my honest opinion.” (R. 111)

- (d) ARTHUR JOHNSON LET CALVIN C. JOHNSON TAKE OVER THE ACTIVE MANAGEMENT OF HIS BUSINESS AFFAIRS, AND CALVIN OCCUPIED A POSITION OF CONFIDENCE AND TRUST.

Appellants contend that there is no evidence to sustain the finding that Calvin took over the management of most of Arthur Johnson's properties and business affairs, or that Arthur had placed considerable confidence and trust in Calvin. We submit that the evidence almost conclusively shows that he did.

Several witnesses testified that Mr. Johnson's wife Carrie, was prior to her death, the "business head" and had assumed the active management of the business property. (R. 27, 111, 119, 166) Arthur Johnson was deeply affected by her death in July of 1953. (R. 120) He was ill at the time, and was hospitalized much of the Fall and early Winter of 1953, as is outlined above. The need for help no doubt existed, and, in any event, numerous witnesses testified that Calvin took over the active management of Arthur's business affairs. (R. 27, 111, 120, 166, 167) This is further borne out by the documentary evidence and the testimony of the various tenants. There are checks going back to 1955, made payable to Arthur Johnson by numerous tenants but deposited to his account by Calvin. See, for example plaintiffs' Ex. 3 and 9 and R. 473, 558-66. These checks conclusively show that Calvin was receiving substantial amounts of rent and placing it in the Arthur Johnson bank account.

There are also checks conclusively showing that Calvin Johnson was authorized, and did draw checks against the Arthur Johnson account. For example, the attorney fee which was paid to Attorney Fenton for drawing

the deed to the business property is dated November 14, 1956, and is drawn against Arthur Johnson's account and signed by Calvin. (Ex. 16) See also a check dated May 8, 1957, drawn to Frank Farnsworth for \$40.00, and another check to a Mr. Meeks, dated June 12, 1956. (Ex. 8) Both of those checks were drawn against Arthur Johnson's account by Calvin.

The testimony of the various witnesses leaves no doubt that Calvin was in active management of the properties of his father. Respondent Narvol Johnson testified affirmatively that after his mother's death in 1953, Calvin took charge of their father's business property. (R. 27) Narvol also testified that his father didn't show much interest in handling the business rentals. (R. 35) "He just lay on the bed sick. Customers would come into the store, and he wouldn't wait on them.\*\*\*" (R. 35)

Vernon Johnson was of the opinion that since his prostate operations Arthur was not able to discharge his business responsibilities. (R. 111)

Della Johnson also testified affirmatively that Calvin ran his father's business after the mother, Carrie, died. (R. 166, 167)

Respondent LaFaun Fleming testified that her father was very forgetful by April of 1955. (R. 252)

Narvol also testified that his father owned a Packard automobile; that Calvin traded it in for an automobile for Calvin (R. 21). He also testified that Calvin received all of the range rights—a 300 head permit —



which had belonged to his father. (R. 22, 23) Narvol was asked who operated their father's cattle now, and he answered that they are operated by Calvin. LaFaun Fleming also testified that Arthur Johnson couldn't get around by himself outside the house; that this was because of a combination of physical and mental disabilities. (R. 254) Mrs. Fleming also testified that after her mother's death, her father was depressed; that he was not able to care for his business affairs and "he turned—Calvin took charge of his business." (R. 270)

Even the witnesses called by the defendants confirmed Arthur Johnson's disinterest in his business affairs and Calvin's active management. Mr. Jones was a tenant of Arthur Johnson. He paid Arthur when he could, but otherwise paid the rent to Calvin. (R. 395) He testified that he discussed renewing his lease with Calvin, and that Arthur "*may*" have been present. (R. 396, 397) He needed to get the roof fixed on the building he was renting from Arthur but he said that he saw Calvin about it. (R. 398) When he was asked if it was not Calvin, he talked to on the roof, he said, "We talked to both of them." He was then asked in effect if his principal conversation about the roof was not with Calvin, and he answered "Yes." (R. 398)

Sylvan W. Johnson, who was also called by the defendants, testified on cross-examination that Arthur Johnson told him to pay the rent to Calvin, because he, (Arthur) was probably going to California. He also testified that he kept delivering the payments to Calvin,

although the checks were made payable to Arthur. (R. 442) He testified about taking over the grocery store in February of 1956 from Arthur Johnson, but that Calvin helped him take the inventory. (R. 451, 452)

Mr. Neaf Swapp was another tenant of Arthur Johnson. He took over the lease previously made to one Garn Hamblin. When that lease expired in 1956, he talked to Calvin about it—not to Arthur. Still, it was his understanding that he was leasing from Arthur, and he made his rent checks payable to Arthur, but he delivered them to Calvin. (R. 473)

There is other evidence of the same type. We think the record thus conclusively shows that the father did permit Calvin to manage his affairs and placed trust and confidence in his son Calvin.

(e) THERE ARE NUMEROUS ABNORMAL ACTIONS,  
SOME NOTED AS EARLY AS 1954.

We will not separately review here all of the items of abnormal conduct, but they were many, and further support the findings to the effect that Arthur has been mentally and physically incompetent since at least the Spring of 1955. In 1954 he buried his money in the basement of the store. (R. 195) At about this same time he was asked about \$30,000 which his wife had kept hidden in the store, and he said, he just “forgot” where she said she put it. (R. 28) In the Fall of 1954 he “just forgot” a valuable lease of State School lands in Arizona. (R. 27) On several occasions in 1955, Mr. Johnson came down-town with his trousers unbuttoned—just holding on to

his belt. (R. 35)

Narvol said that Mr. Johnson was in so much pain in the Spring of 1955 "that he didn't know hardly anything" (R. 38) In April of 1955, when he was staying in Salt Lake with his daughter, LaFaun, he would on many occasions forget to dress. (R. 252) He would forget to eat sometimes, and other times LaFaun would feed him and only a few minutes later he would complain that she hadn't fed him, and she would fix food again, and he would again eat. (R. 252, 253)

In April of 1955, he was afraid to go out of the house in Salt Lake City — afraid he couldn't find his way around. (R. 332) During his stay at LaFaun's house in April of 1955, her husband had to bathe and shave Mr. Johnson. (R. 333) He never bathed himself even a single time. (R. 336) It was also in April of 1955 that Mr. Johnson had a bowel movement and "messed all over the bed and floor" and Mr. Fleming testified "each time I bathed him, well, he had messed in his garments." (R. 333)

By January 1, 1955, he had lost interest in handling the business of his rentals. (R. 35) It was at this time that he would lay on the bed sick and not wait on customers and would leave the store unlocked. (R. 35) By the Spring of 1955 Narvol noticed that Mr. Johnson "suffered from lapse of memory," and that he could not make decisions. (R. 36) It was in the Spring of 1955 that he would rent cabins to various Indians on one day and call the officers to put them out the next day—then he would

rent to them again. (R. 36)

His brother Vernon testified that on May 21, 1955, Mr. Johnson signed a check on which the signature was so poorly made that Vernon did not think it would go through the bank. (R. 114) Vernon also said that at this time Mr. Johnson, while staying at LaFaun's house in Salt Lake, thought he was in Kanab. (R. 108)

All of the above transpired prior to the time he signed the deed giving Calvin all of the field properties valued at \$12,650.00 on July 20, 1955, and preceded by more than a year the deed to the business property, on May 20, 1956. In the meantime, everyone recognized that Mr. Johnson was getting progressively worse. As time elapsed, he got more careless about coming among people while he was undressed. (R. 252, 95, 377). In the Fall of 1955 he locked himself in a public restroom at a service station and made a terrible fuss because he said there wasn't any toilet paper, when in fact there was. (R. 39)

It was in December of 1955 that he was wandering around the hospital without knowing where he was, (R. 92) and this happened again on May 18, 1956. (R. 93) By the Spring of 1956 he would get confused about directions in Kanab. (R. 125) He stated that he wanted to go to the post office to get his hair cut. (R. 30) He complained that they were putting hay in the house. (R. 175) He didn't recognize his daughter-in-law, Della, in whose house he had lived a considerable time. (R. 377) He told of taking an air circulating fan to be repaired—that he took it in his Packard. He didn't have the Packard, and

he hadn't taken the fan. (R. 174) On July 16, 1956, Della advised him that his own father had died. Mr. Johnson just smiled. That was his only reaction. (R. 188-9)

(f) THE CONDUCT OF CALVIN AND ARTHUR AFTER THE DATE OF THE DEED SHOWS THAT NEITHER TREATED THE PROPERTY AS BELONGING TO CALVIN.

There is considerable evidence demonstrating that even after the deeds were recorded neither Calvin nor his father Arthur considered Calvin to be the owner of the property. It is clear that the deed to the business property was given to Calvin on May 20, 1956, on the day Arthur was temporarily released from the hospital. (R. 505) Thereafter, if the property were his, it would have been logical for Calvin to notify the tenants that he had acquired the property from his father, and that they should make their rent checks payable to Calvin. This was not done. In most instances for more than a year, and continuing nearly to the time when respondents discovered the deed, and confronted Calvin with it, the tenants all thought they were still renting from Arthur and still made the checks payable to Arthur. (R. 420-8; 443-8; 473) The checks were being deposited into Arthur's account.

More damaging still to the position now taken by the appellants is the testimony of G. C. Bonham, who was a witness called by the appellants. He testified that he made a lease for part of the Johnson property and took the property over on June 6, 1956. This was some sixteen days after Calvin allegedly had become the owner of the

property. This lease was introduced as Ex. Q. It names Arthur Johnson as lessor and is dated June 1, 1956. (R. 556) By this time Calvin had already recorded the deed, conveying this property to Calvin absolutely. (Ex. 1) Calvin and Arthur both signed the lease, but the lease names only Arthur as the lessor. Since Calvin signed the lease, it is conclusively shown that Calvin knew that his father was making a lease on the property after Calvin claimed to own it. Mr. Bonham admitted that Arthur Johnson was not present when he discussed this lease with Calvin. (R. 560) But when it came time to sign the lease, Mr. Bonham picked Calvin up at the pool hall and they went to Arthur's to get Arthur to sign the lease. Nothing was said about Calvin owning or buying the property, or about Arthur having conveyed it away. (R. 561) On June 12, 1956, the first rent check was made out by Mr. Bonham, and it was made payable only to Arthur Johnson. (R. 562) The check was endorsed, "Arthur Johnson by CCJ," and it was put in Arthur Johnson's bank account. (R. 556) Subsequent checks for rent on this lease throughout the Fall of 1956 and the Spring of 1957 were made payable to Arthur Johnson. (R. 564, 565) They were all deposited to Arthur Johnson's account. In April of 1957, the first check was made payable to Calvin, because Calvin told Mr. Bonham to make it out that way. (R. 567)

This is not the only lease made by Mr. Johnson *after* the deed to Calvin. Witness Neaf Swapp, who also was called by appellants, testified that he had been renting

business properties from Arthur since October of 1956. (R. 367) He took over the lease of a Mr. Hamblin. When the lease expired in 1956, he went to Calvin to talk about a renewal. (R. 473) When he was asked at what date in 1956 he re-negotiated his lease on the property, he answered, "It was in October, I believe." (R. 474) Beginning in November of 1956, and continuing for several months thereafter, he made his rent checks payable to Arthur Johnson, (R. 456) and while he renegotiated the extension of the lease with Calvin, it was in Arthur's name. (R. 474)

So in at least two instances after Calvin got the absolute deed to the property on May 20, 1956, he took the primary role in renegotiating two leases, one on June 6, 1956, and the other in October of 1956. In both instances the new leases were made in the name of Arthur Johnson as lessor. The rent checks were made payable to Arthur and deposited into Arthur's account by Calvin.

Calvin may have been able to enlighten the court as to why after he held an absolute deed to the property, he continued to negotiate leases for his father and in his father's name, why both he and his father signed the Bonham lease, and why he received rent checks payable to his father and put them in his father's bank account. But although he was in court throughout the trial, he did not take the witness stand to explain any of these transactions. He occupied a position of trust, both because of his family relationship, and because he managed his father's business. He, as we will note

in more detail below, had a duty to speak, if there were any explanation for this conduct. He elected to remain silent, and the law requires the drawing of all reasonable inferences against him.

There are many other things indicating that the father did not realize he had parted with the title. He talked to Narvol and Narvol's wife Della to endeavor to get them to buy his business property in the Fall of 1956. (R. 184) This was long after he had allegedly deeded it to Calvin. He tried to sell the lot on which the Dairy Queen is located to a Mr. Crandall of the Salina Bank in October, 1956. (R. 177, Ex. 5) This clearly shows that Arthur thought he still owned it. In August of 1956 he talked in terms of dividing the property into equal thirds for his children. This was long after the alleged transfer to Calvin. (R. 185) After May 20, 1956, he told Narvol to put a trailer court on part of the property. Narvol said, "what will the other kids do?" and Arthur said:

"To the devil with the other kids. If I want to put a trailer Court in there, that is my property, and I can do what I want with it." (R. 186)

The water assessment for the irrigation water for the field property was paid by Arthur Johnson as late as 1957. (R. 155) This is inconsistent with the conveyance to Calvin on July 20, 1955.

Two other things of slight significance in themselves show at least that Mr. Johnson did not understand the deed and contract. First, Narvol's name is frequently



misspelled in the documents. The father ought to have noticed this. Secondly, the deed included all of Lot 3—yet the Peach's Trail End Cafe had been sold from this tract several years before. Mr. Johnson should also have noted this.

All this conduct is absolutely inconsistent with Calvin's present contention that his father fully knew and realized that he was conveying to Calvin the field property in 1955 and the business property on May 20, 1956. Calvin had actual knowledge and participated in most of the transactions where Arthur still claimed the property. If it was not Arthur's—why didn't Calvin say so?

Calvin not only did not claim the property, but continued to admit Arthur's ownership. After May 20, 1956, when Calvin had title to the property, he was asked by Narvol about Calvin's plans to construct the Dairy Queen on part of this property. Narvol said: "How are you going to borrow money on Dad's property to build a cafe on Dad's property?" Calvin answered: "I am going to borrow it on insurance." (R. 43-4) He was asked if he was going to borrow on his Dad's insurance, and he said, no, he would borrow it on his own insurance. Narvol told Calvin that Calvin had no interest in the property and should not build on it, and Calvin said he was going to build on it anyway, and then said:

"That will be more rentals, *we will have more to divide up*, \$300.00 a month more." (R. 44-5)

Calvin also told his sister LaFaun *in the Fall* of 1956:

“Well, I have to pay the taxes and the insurance and Dad’s expenses, and all the rest is put aside to be set apart, to be divided.” (R. 266)

Calvin was asked about the large amount of money their mother had hidden, and he said:

“Yes, that’s set aside. That’s put away. Yes, it is going to be divided equally when everything is taken care of.” (R. 267)

It is also of importance to note that although rentals in excess of \$1,000 per month were being collected by Calvin for Arthur, Arthur had only 97 cents in the bank account at Panguitch, and \$267 in Salina at the time of the trial.

**(g) THE NATURE OF THE TRANSACTION ITSELF  
DEMONSTRATES A LACK OF BUSINESS SENSE.**

Attorney Fenton wrote a letter dated April 24, 1956, (plaintiffs’ Ex. 15) concerning the purchase agreement on the business property. The letter was not addressed to Arthur, but to Calvin. In this letter he notes that “in the office we talked of leaving the title in shape so that you (Calvin) could mortgage the same if you felt it desirable. At another time in Kanab we talked of putting title in escrow until paid for or of passing title to you and executing a mortgage from you to Art on the property, to guarantee the payment of the purchase.” He advised Calvin to discuss these security arrangements very carefully with Arthur. From this letter, two things are clear: First as late as April 24, 1956, Arthur still did not fully understand the matter, for Attorney Fenton wanted to be sure Calvin explained it to Arthur;

and second, the explaining was left for Calvin to do. Attorney Fenton apparently did not talk with Arthur again until the day the deed and contract were signed. If it took a normal day or two for the letter to reach Calvin, he would only have had three or four days to talk to Arthur before Arthur fainted and was hospitalized on April 30, 1956.

From April 30th to May 20, 1956, Arthur was seriously ill, as is outlined above. He was wandering around the halls of the hospital on May 18th not knowing where he was, etc. On May 20th, the day he was released from the hospital, Calvin got the deed and contract. They were signed in Calvin's home and in Calvin's presence. (R. 505, 510, 522)

Since Attorney Fenton had left to Calvin the responsibility for explaining the entire transaction to Mr. Johnson, it would be very interesting to know whether Calvin ever did so, but Calvin elected to remain silent, did not take the witness stand. Again, under well established principles of law, his silence points the finger of guilt and the court can only infer that had he testified, the truth from his own lips would have been more damaging to him than an inference which the court can draw from his failure to talk. It is reasonable to infer that Calvin did not explain it. Mr. Fenton had recommended some security arrangement, had asked Calvin to explain this to Arthur. The contract provided for none. A deed absolute in form was delivered and recorded. The manner in which the contract and deed

were handled shows a complete lack of business understanding. When coupled with the fact that Arthur and Calvin both thereafter consistently treated the property as still belonging to Arthur, the evidence shows conclusively that Arthur did not know what he was doing and was not in full control of his mental faculties.

The transaction which was finally executed had no protection in it whatever for Arthur. The agreement of purchase which was executed at the same time was not recorded (R. 371) and it is reasonable to assume that but for this lawsuit, the agreement to purchase would never have seen the "light of day." If Arthur Johnson had been in control of his mental faculties sufficient to permit him to manage his business affairs, and he had been told about placing the deed in escrow or taking a mortgage back, the very least he would have done would have been to see that the agreement of purchase was recorded along with the deed. The fact that he would turn over to Calvin absolute title to \$150,000 worth of property without any security, itself suggests lack of mental capacity, but the further fact that he would not record or require Calvin to record, or request his attorney to record the contract of purchase, is simply out of harmony with expected conduct of any experienced businessman. Calvin, because of his family ties and the control he had taken over Arthur's business, certainly owed a fiduciary duty to give Arthur some guidance and protection. He gave him none at all.

Reference to the agreement itself shows a further lack of business understanding. The purchase price most favorably construed provided for payment of only \$50,000. (Ex. 2) If Mr. Johnson had died, it might have been nothing. The record stands absolutely uncontradicted to the effect that the property had a value of \$150,000. Appellants state in their brief that there was some conflict, but there was not any. Narvol fixed the value at \$150,000, (R. 17) and two independent businessmen, who owned similar main street property, each expressed a similar opinion. See the testimony of Carl McDonald (R. 228) and Odell Watson. (R. 234) Further, the agreement provided for payments of only \$300.00 per month, or  $\frac{1}{3}$  of the net income, and did not require the payment of interest.

The combined rents on the business property were in the neighborhood of \$1,300.00 per month. (R. 14-20, 179-82, 442-9) This isn't in dispute. The rents were as follows:

Drug Store.....	\$100.00
Snack Bar .....	75.00
Gift Shop.....	80.00
Service Station.....	75.00
Pool Hall .....	200.00
Grocery Store.....	80.00
Clothing Store.....	100.00
Dairy Queen .....	300.00
Home .....	80.00
Old Frame Building.....	150.00
Apartment Above Store.....	100.00
<hr/>	
Total	\$1340.00

He also had some cabins renting for \$15.00 per month each. With the very property covered by the contract yielding a rental in excess of \$1300.00 per month, the fixing of the payment as low as \$300.00 or lower if net income were down and providing that the balance could be paid without interest, are contrary to all common business sense.

(h) CALVIN'S APPARENT EFFORT TO CONCEAL HIS ACQUISITION OF THE PROPERTY ALSO CONDEMNS HIM.

If these transactions were open and above board and expressed the desires of Arthur Johnson, and if Arthur Johnson were in full control of his mental faculties, Calvin could have avoided the possibility of this lawsuit by transacting this business in the open, so that his other brother and his sister could know about it and could talk with their father about it. But "the guilty runneth before they are pursued." Calvin actively endeavored to conceal the acquisition of the property by him. First, if the field property were fully paid for at the time the deed was made out on July 20, 1955, there is absolutely no reason why he should not have recorded it then, but he did not record it until January of 1958, several months after this lawsuit was filed. (Ex. 7) Also he failed to take the witness stand and explain this at the trial.

There were many situations which called for Calvin to speak out. First, he was confronted by the discovery of the deed to the business property in May of 1957. A

rather violent family quarrel ensued. Calvin acknowledged that he had the deed to the business property and said he was going to keep it. The respondents were complaining that it was not fair, but Calvin didn't mention that he was buying the property under a contract, nor that he also had the deed to the field property. and the cattle and the other property. (R. 47, 264) The parties had a hearing on August 6, 1957, concerning the competency of Arthur Johnson and went into many of these transactions, and again Calvin did not tell the court or the parties about the deed to the field property.

Arthur Johnson had a vacant tract of land. Calvin constructed a Dairy Queen building on it. The respondents asked him about this and asked in effect, "How come you are putting a building on Dad's property?" Calvin didn't tell them about having the deed, but said he was going to borrow on some of his (Calvin's) insurance. He also volunteered that this was a good thing for all three of them; that there would be more money and property to divide up; that it meant an additional \$300.00 in rent for them. (R. 44-5) At this very time he was holding the deed and was really putting the Dairy Queen building on property, which he now claims to have owned. He was not building it for the benefit of the three. But he didn't tell them the truth about this. Again let it be noted that Calvin did not take the witness stand to deny these conversations, nor explain his conduct.

Further, Calvin recorded the deed to the business

property in June, only two short weeks after he received it. (Ex. 1) But he didn't record the contract which would have shown an obligation on his part to pay at least something for the property. (R. 371) He did not notify any of the tenants of the alleged change in ownership, so that except by actually checking the records and discovering the deed, no one would know about it. He let the tenants continue to write their rent checks payable to Arthur. He continued to put the rent checks in Arthur's account. (R. 420-8; 443-8; 473-9) The sum total of the rent checks, as noted, were under any possible construction of the testimony more than three times his monthly payment, as shown by the contract. Since the deferred balance did not bear interest, he had absolutely no advantage in prepayment, and a deposit to Arthur Johnson's account of amounts in excess of the monthly contract payment simply cannot even raise an inference that these were payments on the contract. Further, since Calvin did not testify, any inference drawn must be against him and not for him. In short, he simply didn't want Arthur or the other children or the tenants to know that he claimed to be the owner of the property. He was angry when confronted with the discovery of the deed. He told his sister he had hated her all his life, and he welcomed this chance to get even with her. (R. 47, 264) His violent flare of temper when confronted with the deed suggests that he had "been caught" and he resented it. He did not then try to defend the transaction on the basis that it was an arm's length negotiated sale. He didn't tell them he had



agreed to pay \$50,000 for the property, or that he had been making the payments. He simply said it was his, and he was going to keep it, knowing that his father by this time in May of 1957 was hopelessly incompetent, and could not contradict him.

The trial court found that while occupying a position of confidence and trust Calvin imposed on his father. The very day he got out of the hospital and while Mr. Johnson was seriously ill, Calvin took him to Calvin's home, and in the absence of the other children had him enter into an unconscionable, unreasonable transaction. The evidence fully sustains these findings and both Calvin's and Arthur's actions thereafter demonstrate Arthur did not understand what he was doing.

- (i) THE COURT SHOULD INFER FROM THE FAILURE OF APPELLANTS TO TESTIFY, THAT THEIR TESTIMONY, INSTEAD OF REFUTING, WOULD HAVE SUPPORTED THE INFERENCES AGAINST THEM.

We have noted above that neither of appellants elected to testify. Both were sitting in court throughout every minute and day of the trial. Neither placed himself upon the witness stand to vindicate what he had done in connection with securing this valuable property from an old and sick man. Calvin was content to attempt through his counsel on cross-examination to malign the integrity and character of his brother and sister, but was not sufficiently convinced of the propriety of his own actions to submit to the same type of interrogation. His counsel states in the brief that Calvin was a "sober"

man and that he was not addicted to drink. There is not one word of evidence to this effect.

Under the cases, it does not matter that respondents could have called Calvin as an adverse witness. The defense was for Calvin to make. When he elected to remain mute, the only inference the court can draw is that the truth would have been more damaging to him than the strongest inferences which could be drawn from his silence.

The cases are absolutely uniform in so holding. The matter is discussed in some detail in "Wigmore on Evidence," Third Edition, Sec. 289, page 172. Wigmore quotes with approval from the case of *Attorney General v. Pelleteir*, 240 Mass. 264, 134 NE 407, as follows:

"Instant impulse, spontaneous anxiety and deep yearning, to repel charges thus impugning his honor would be expected from an innocent man. Refusal to testify himself or to call available witnesses in his own behalf under such circumstances warrants inferences unfavorable to respondent. It is conduct in the nature of an admission. It is evidence against him. This principle of law has long been established and consistently applied. The reason is that it is an attribute of human nature to resent such imputations. In the face of such accusations, men commonly do not remain mute, but voice their denials with earnestness, if they can do so with honesty. Culpability alone seals their lips. The law simply recognizes the natural probative force of conduct contrary to that of the ordinary man of integrity."

Professor Wigmore states that this principle of law

is almost uniformly followed. He cites the case of *United States v. Mammoth Oil Company*, 14 F. 2d 705, which was affirmed by the United States Supreme Court, and states that the analysis of Judge Kenyon is an excellent statement of the rule. The discussion on this point begins at page 729. The court in part noted:

“These gentlemen have the right to remain silent, to evade, to refuse to furnish information, and thus to defy the government to prove its case; but a court of equity has the right to draw reasonable and proper inferences from all the circumstances in the case, and especially from the silence of Secretary Fall, and from the failure of Sinclair to testify. *It is not sufficient answer that the government might have used Sinclair as a witness. He was properly a witness for the defense.*”

The trial court had noted that the entire transaction had been revealed by other witnesses, and that the failure of Sinclair to testify was, therefore, not important and might only raise the inference that he failed to testify because he knew nothing further, but the appellate court disagreed and said:

“We do not reach the same conclusion under the record. We fail to perceive why, under all the circumstances revealed in this case, it should be presumed that Sinclair knew nothing more than the other witnesses. \* \* \* With important and controlling facts in Sinclair’s possession, and with a train of circumstances that aroused the gravest suspicion as to corruption practiced in securing the lease laid at his door, his failure to testify is a matter of deep significance. There is a pre-

sumption in the law that, if a litigant have facts within his knowledge and refuses to reveal them, it is presumed that if revealed they would be against him."

See also *Gulf, C. & S.F. Ry. Co. v. Ellis*, 54 Fed. 481, 4 CCA 454.

The cases all hold, of course, that there must be "laid at the door" of the defendant by evidence tending to show improper conduct, a situation which would induce a normal man to speak. Clearly the evidence does this here. Calvin is accused of imposing on his aged, sick and incapacitated father. If he paid full value for the field property in an arm's length transaction in 1955, all he had to do to completely clear his name was to tell the court what he paid, how he paid it, and the circumstances under which his father deeded it to him, but he chose to remain silent. The same is true as to the agreement of sale and the deed to the business property. Evidence had been adduced to show that the property was worth more than \$150,000; that it produced rents of more than \$1300 per month. He had procured a deed, without paying anything for it, and had kept hidden a contract purporting to let him buy the property for one-third of its value, without interest, and with monthly payments in an amount far less than the rental. He was confronted with evidence that he and his father had both thereafter treated the property as still belonging to the father. He had heard the testimony that he had been collecting the rent and handling his father's properties—drawing checks on his father's account. He

had heard the testimony that with \$1300.00 per month coming in as rent, the father's bank accounts were empty. Certainly the reason for him to speak had been "laid at the door." He elected to remain mute. The court, therefore, properly concluded that he had no explanation; that the father did think that the property was still his and did not realize that he had parted with title. Thus, the strong evidence of physical and mental incapacity, is corroborated by the admissions and inferences that flow from the defendants' election to remain silent.

- (j) THERE WAS A RELATIONSHIP OF TRUST AND CONFIDENCE BETWEEN CALVIN AND HIS FATHER, WHICH PLACED THE BURDEN ON CALVIN TO PROVE BY CLEAR AND CONVINCING EVIDENCE THAT THE TRANSFER OF THE PROPERTY TO HIM WAS PROPER.

Where a fiduciary relationship exists, and there is a transfer without adequate consideration, the burden is on the donee to prove by clear and convincing evidence that the donor had his full mental faculties and acted without fraud or undue influence on the part of the donee. This principle is recognized by the recent Utah case of *Jardine v Archibald*, 3 Utah 2d 88, 279 P. 2d 454. In that case the trial court had found that there was no fraud or undue influence; that the mother had full control of her mental faculties and had made a gift to her two younger children because she wanted to. The appellants had urged that there was a presumption of fraud created by the fiduciary relationship which there existed, and that this presumption was even strong

enough to warrant the reversal of the trial court's finding that there was no fraud or mental incapacity. In affirming the trial court, the Supreme Court recognized the existence of the presumption, but held under the evidence of that case that the presumption had been rebutted.

The trial court had found that a confidential relationship existed—as the trial court has found here. The evidence upon which that finding was based showed only that the donor was eighty years old, that she was suffering from high blood pressure, hardening of the arteries, and headaches, being forgetful at times and even eccentric. In addition, one of the donees took care of her finances and operated her farm. The Supreme Court said this evidence “clearly sustains” a finding that a confidential relationship existed.

All of these elements are present here. The trial court in this case has found that Mr. Johnson was sick and mentally incompetent. In both cases the relationship was one of parent and child. In both cases, in addition to the blood relationship, the donee managed the finances for the parent. In both cases the trial court found that a confidential and fiduciary relationship existed and under the holding of the *Jardine* case, the evidence “clearly sustains” this finding. The consequence of such a holding is noted in the *Jardine* case as follows:

“It is well settled that where a fiduciary or confidential relationship exists between the donor and donee, equity raises a presumption against the validity of such transactions and the burden

is cast upon the donee to prove their validity and that there was no fraud or undue influence by proving *affirmatively* and by *clear and convincing* evidence compliance with equitable requisites. This is because there is implied in every fiduciary or confidential relationship a superiority held by one of the parties over the other. \* \* \* Whether the donee has sustained his burden of proof necessarily depends upon the facts adduced in each case."

Thus under the ruling of the *Jardine* case, the burden was on Calvin to prove not by a mere preponderance, but by "clear and convincing proof" that the transaction was entirely proper. As to his own intimate connection with these transfers, Calvin elected to remain silent. The evidence he adduced to rebut the inference and to carry the burden of proof which was thus by law placed upon him amounted to little more than the calling of several tenants who had observed Mr. Johnson from time to time, and said "hello" to him. They said he appeared normal. Each of the tenants confessed that if he had problems with his lease he went to Calvin—not to Arthur; that while he made the rent checks payable to Arthur, payment was delivered to Calvin and deposited by him to Arthur's account; when they wanted to renew their lease, they went to Calvin, and after it was discussed, Calvin took them to Arthur. Calvin was present when the leases were renegotiated and signed. Calvin—not Arthur—helped with the inventory when the store was sold. A bishop, who called on Arthur frequently, was called to testify that he gave Arthur a temple re-

commend. Attorney Fenton was also called to give the details on the delivery of the deeds.

The trial court was not required to accept the testimony of Mr. Fenton that Mr. Johnson appeared to be all right as against the inferences and affirmative evidence to the contrary. At the outset, Mr. Fenton demonstrated that his memory was not too clear on the transactions. Mr. Fenton had testified that the will definitely was signed the day Mr. Johnson got out of the hospital, and at Calvin's home. (R. 505, 522) However, some months after the will was signed, Attorney Fenton had written a letter, dated the 13th day of September, 1956, (Ex. J) clearly stating that he had no clear recollection as to where the will was signed. In the body of the letter he stated: "This was signed by Art in Kanab, if my memory is correct, and at the same time Calvin executed a will of his own. I presume Arthur has turned possession of the will to Calvin, but at the same time I am not certain of this." Then in longhand at the end of the letter he said: "Faun: This will may have been signed in my office, but I am certain it has been signed." This evidence thus discloses that Attorney Fenton didn't remember too clearly the details of this transaction.

There is also a letter from Attorney Fenton (Ex. 15) which was written on April 24, 1956, to Calvin—not to Arthur. He told Calvin to go to Arthur and be sure that Arthur understood the nature of the transaction. This letter clearly shows that as of that date Mr. Fenton was not satisfied that he had given Arthur full advice or



that Arthur fully understood the matter. While he thus urged Calvin to explain it carefully to Arthur, Calvin never took the witness stand, and we have no testimony to the effect that Calvin did explain it to Arthur. There is much to indicate that he did not for only a few days later Arthur became seriously ill and was hospitalized most of the time from April 30th to May 20th, when he signed the deed.

The letter of April 24th also indicates that he may also have been to some extent at least looking out for the interest of Calvin, perhaps had prepared Calvin's will too, for he said in the later letter to Faun that Calvin made a will on the same day. In November, 1956, the bill which he sent was paid by Calvin, but from Arthur Johnson's account.

Finally, there is a natural inclination for anyone to defend a transaction in which he participated. In a transaction of this kind, the complaining parties are never present. The only evidence they can ever offer is circumstantial. They can only raise inferences suggesting that the act was not the free and voluntary act of the donor. This is clearly noted by our Supreme Court in *Re Richards Estate*, 5 Utah 2d 106, 297 P. 2d 542. This case concerned the mental capacity of the decedent. The will had been witnessed by the attorney who drew the will. He had testified in a manner calculated to support the will. The trial court had found against the will. In sustaining that decision, the Supreme Court noted that the trial court didn't need to accept as fact the testimony

of an individual who had an interest in the outcome, and said:

“This is not limited to where the witnesses are actually parties or have a direct pecuniary interest, but in addition, there may be the case, as here, where the witnesses (both connected with the executor, either as employees or counsel) have an interest by way of vindicating the propriety of their conduct. Such matters are of particular importance to consider under circumstances where those whose rights are affected were not present when events which later proved to be of critical importance transpired. They are left to accept the testimony of those who were present or to discredit it by showing adverse interest, inconsistency, unreasonableness or other weaknesses therein.”

In this case, we don't even have the testimony of all the participants in the transaction, because the appellants, as noted above, elected to remain mute. We have a fiduciary relationship, which in law placed upon appellants as recipients of the property, while Calvin held a fiduciary position, the burden to come forward with clear and convincing evidence. This burden cannot be met by his remaining silent, and by the observations of Calvin's tenants that Arthur looked all right, and by the above referred to testimony of the attorney. Had the trial court found that Arthur Johnson had full possession of his mental and physical faculties, and that there was no fraud or undue influence, we would have had an entirely different problem. Even such a finding by the trial court, probably could have been overturned,

because contrary to the clear evidence, but we don't have that problem here. The trial court has found that Arthur Johnson was sick, did not have his mental faculties, was physically disabled, that he did repose special trust and confidence in Calvin, and that Calvin abused the confidence and by fraud and undue influence, and while the father was out of contact with his other children, procured without adequate consideration all of his properties. Our problem is only one of determining whether the evidence will sustain these findings. We submit that it clearly does, even unaided by any inference or presumption. But the evidence does not stand alone. An inference of culpability and guilt is drawn from the silence of appellants at the trial. They also had the burden by clear and convincing evidence of overcoming the presumption which arose out of their confidential relationship. This presumption is one which remains in the case and can be weighed and considered as evidence. See *In Re Swan Estate*, 4 Utah 2d 277, 293 P. 2d 682, where the court said:

“A presumption which shifts the burden of persuasion does not vanish from the case upon a prima facie showing but remains throughout the case to require the fact finder to decide such issue of fact against the party having such burden unless he is convinced by the required degree of proof or measure of persuasion that the facts on that issue are contrary to such presumption. So, in this case, since we hold that this presumption shifts the burden of persuasion that there was no fraud or undue influence onto the proponents of the will, the fact finder must find that issue

against them unless he was convinced from the evidence that there was no fraud or undue influence."

It is respectfully submitted that the evidence, together with these presumptions, adequately sustain the trial court's findings.

## II. IN AN EQUITY CASE THE TRIAL COURT'S FINDINGS OF FACT SHOULD NOT BE SET ASIDE BY THE APPELLATE COURT, EXCEPT WHERE THEY ARE MANIFESTLY IN ERROR.

As is noted above, there is only one issue of law raised, to-wit, were appellants entitled to a jury trial as to the validity of the will? All other issues relate to the sufficiency of the evidence to sustain the findings of fact. Although in an equity case, the court is to review both the law and the facts, the findings of fact by the trial court are not to be lightly set aside. The Utah Supreme Court has stated the rule many times. For example, in the case of *First Security Bank of Utah v. Burgi*, 122 Utah 445, 251 P. 2d 297, the court said:

"While upon an appeal of a case in equity, this court may review the findings of fact as well as the conclusions of law; nevertheless, the findings of the trial court will not be set aside unless it manifestly appears that the court has misapplied the proven facts, or made findings clearly against the weight of the evidence."

This rule obtains for the very practical reason that the trier of the facts had the witnesses before him, was able to observe their demeanor, and evaluate their credibility. It is submitted that on this record, the court

cannot properly conclude that it “manifestly” appears that the trial court has misapplied proven facts or made findings “clearly” against the weight of the evidence.

III. THERE IS NO DISPUTE BETWEEN THE PARTIES AS TO THE SHOWING NECESSARY TO PROVE LACK OF CAPACITY.

The Utah Supreme Court has on numerous occasions had before it the necessity for stating the test for determining mental capacity to make a deed. Some of these cases are referred to by appellants. There apparently is no dispute between the parties as to the law on this point. Some of the important cases in this regard are: *Anderson v. Thomas*, 108 Utah 252, 159 P. 2d 142; *Hatch v. Hatch*, 46 Utah 218, 148 Pac. 443; *Anderson v. Johnson*, 1 Utah 2d 400, 268 P. 2d 427; *In Re LaMonte's Estate*, 95 Utah 219, 79 P. 2d 649; *Blackburn v. Jones*, 59 Utah 558, 205 Pac. 582. See also *Russworm v. Mims* (Okla). 164 P. 2d 238, and *Sparks v. Sparks*, (Cal.) 226 Pac. 2d 238.

We will not prolong this brief to discuss all of the above cases in detail. However, the facts in *In Re LaMonte's Estate*, supra, and *Anderson v. Johnson*, supra, are strikingly similar to the facts in the instant case. In the *LaMonte* case, the grantee in the deed to certain property ran his mother's business for her and secured a deed from her to the property. She was eighty years of age, senile and failing in memory. The court held that there was sufficient evidence of incompetence.

In *Anderson v. Johnson*, supra, the suit was brought to determine the validity of certain deeds. The grantor

had a similar illness to that of Arthur Johnson here, and the grantee played an active role in making the deed and the will. The court held that the evidence of the grantor's mental incapacity was sufficient.

In *Russworm v. Mims*, the Oklahoma case cited above, the court held that a deed executed for grossly inadequate consideration, by a person of great weakness of mind, arising from age, sickness, or other cause, but not amounting to absolute disqualification, will be set aside by the court on proper and reasonable application of the injured party.

The case of *Sparks v. Sparks*, the California case cited above, involved fraud and confidential relationship. The court said that gross inadequacy of consideration for conveyance of realty, combined with the grantor's dependence on the trust and confidence of the grantee is sufficient to sustain a declaration of fraud rendering the deed void.

We submit that under the above authorities, the conclusions drawn by the trial court from the facts in this case are legally correct.

#### IV. THERE WAS NO ERROR IN DENYING A JURY TRIAL ON THE ISSUES INVOLVING THE VALIDITY OF THE WILL.

Although this point is the first issue raised by the appellants in their brief, we have deferred discussing it, because it is better analyzed against a complete background of the facts. A careful examination of the will (Ex. 14) reveals that by its terms the devisees and le-

gatees named therein are the same persons and would take in the same proportions as is provided by the law of succession in the event of intestacy. Without regard to what the final outcome of this case is, appellants will share in the property in exactly the same way, for under either the will or the statutes on succession, Calvin will share equally with respondents. The only way in which the appellants could possibly be prejudiced is that under the will appellant Calvin was appointed executor and appellant Anna was appointed contingent executrix to act without bond.

(a) THIS IS NOT A "WILL CONTEST."

We contend that there was no error in the denial of the jury trial on this issue. The right to a jury trial in a will case is statutory. Our applicable Utah statutes would be 75-14-18 and 78-21-1, U.C.A. 1953. The Utah court in several cases has said that "will contest cases" are law cases and has indicated that they should be tried by a jury. See, for example, *In Re George's Estate*, 100 Utah 230, 112 P. 2d 498; *In Re Buttars*, 123 Utah 596, 261 P. 2d 171; *In Re LaVelle's Estate*, 122 Utah 253. While we think the comment in each of these cases was dicta, we will not analyze them in detail, because we do not believe that this is a will contest.

A will contest case arises only after the death of the decedent, where the rights of the parties have vested and a suit is brought to enforce legal rights. Before the death of the decedent, the heirs named in an existing will have no vested legal rights. The mere expectancy



of an heir is not regarded as property, and the testator can, without the consent of his heirs, change a will at any time. See Bancroft's Probate Practice, 2d Edition, Sec. 171. "A contest moreover cannot be initiated in advance of offer to probate of the will which is sought to be contested." Bancroft's Probate Practice, 2d Edition, Sec. 162.

At the time of the trial here, Arthur Johnson was still living, but was incompetent. It was not necessary under the law to await his death, so that the parties could offer the will for probate and have a will contest. It was entirely proper for the guardians of Arthur Johnson to bring a suit in equity to have the will declared void during Arthur Johnson's lifetime. Such a suit is not a will contest, but is an action to set aside an instrument. The grounds are mental incapacity and fraud. This raises only equitable issues; it does not involve legal rights. No rights are vested under a will until the testator's death. In view of Calvin's conduct, the guardians would have been derelict in their duty had they not sought on Arthur's behalf to withdraw or cancel the appointment of Calvin as executor.

Appellants confess that an action to set aside a deed on the grounds of fraud or mental incapacity is an equity case, triable without a jury. They also concede that an action to rescind the contract, or to set it aside on the same grounds is equitable and not triable to a jury. (See appellants' brief page 19) Such a confession by appellants is, of course, in complete harmony with the



existing law. Why should there be any other or different rule of law if the instrument being attacked is a will instead of a deed or a contract? Actions to set aside instruments executed by people without mental capacity or to rescind because of fraud have always been considered equitable actions, triable by the court without a jury.

The matter is treated in the West Digest System under the title "Juries," Sec. 14(6) Recent cases applying the rule are *Summers v. Martin*, 77 Idaho 469, 295 P. 2d 265, (an action to rescind a contract and for money damages); *Ward v. Lindly*, (Okla.) 294 P. 2d 296, (an action to cancel a deed because of grantor's incapacity and for possession); *Goodson v. Smith* (Wyo.) 243 P. 2d 163, (an action to cancel a contract on grounds of fraud).

We submit that a suit of this type brought during the testator's lifetime before the rights of any of the parties have vested as legal rights is identical to a suit to vacate a deed or a contract.

(b) IF THE WILL ISSUES ARE HELD TO BE LEGAL, THEY, NEVERTHELESS, WERE ENTWINED WITH EQUITABLE ISSUES, AND THE TRIAL COURT PROPERLY COULD TRY BOTH WITHOUT A JURY.

If it were to be conceded that a suit brought to vacate a will during the testator's lifetime were a will contest, where Calvin had legal rights which had attached and which he could enforce against Arthur Johnson, even then appellants were not entitled to a jury trial. In a suit where issues raised are both legal and equitable,

the Utah Supreme Court has indicated that the incidental legal points can be tried by the court without a jury if the major issues are equitable in nature, and the problems are entwined. Appellants confess in their brief that the major issues here were equitable. In determining the validity of the will and validity of the deeds, the evidence to be adduced was absolutely identical. It was not possible, without a multiplicity of suits, to separately try the issue on the will and the issue on the deeds and contract of sale. From this identical evidence, it was for the court to determine mental capacity to make the deeds, and the contract, and to determine whether there was fraud and undue influence. This appellants concede. But they then wanted a jury to sit and review the identical evidence to determine whether the jury thought the capacity existed to make the will, and whether it was free from fraud and undue influence. This has been often considered by the Utah Supreme Court. In *Norback v. Board of Directors of Church Extension Society*, 84 Utah 506, 37 P. 2d 339, the court said:

“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.”

The holding of this case was modified to some extent by the court in *Valley Mortuary v. Fairbanks*, 119 Utah 204, 225 P. 2d 739. There the court, in regard to

cases where the legal and equitable issues are intertwined stated in a comment on the *Norback* case that:

“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.”

But then the court went on to say:

“There may be certain types 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.”

It is submitted that if both legal and equitable issues of fact are present in this case (which we deny) the major issues certainly are equitable. These equitable issues are so intertwined factwise, with the problems on the validity of the will, that they could not be separated for the purposes of the trial. Under the above quoted rule, the court's decision denying the jury trial should be upheld.

(c) EVEN IF APPELLANTS WERE ENTITLED TO A JURY, THE ERROR WOULD NOT HAVE BEEN PREJUDICIAL.

Finally, we contend that the denial of the right of jury trial is, in any event, not prejudicial. We have already noted that the will does not change the distribution

of the property from that provided by the statutes governing succession. We are litigating here only the right of Calvin and Anna Johnson to serve as executors. The Utah statute, Section 75-3-15, U.C.A. 1953, expressly provides:

“No person is competent to serve as an executor who at the time the will is admitted to probate *is either adjudged by the court incompetent to execute the duties of the trust by reason of \* \* \* want of integrity.*”

If the findings of the trial court in this case concerning the major issue are sustainable under the evidence, Calvin would never be permitted to act as executor of this estate—his conflicts with it are too great, and the adjudication that he defrauded his father of all of his properties would disqualify him to act. Arthur Johnson has now died and the question as to who will act as executor will soon exist. If the findings concerning the primary issues (the deeds and the contract) are reversed, and Calvin is held to own the property absolutely, there isn't any estate to probate. But if the holding of the trial court stands, and all this valuable property comes back into the estate, it must be probated. Either under the will or under the statute, it will go equally to the parties to this suit. In such an event because of the imputations of fraud, Calvin has been adjudged to lack basic integrity. He would not be permitted to execute the duties of the trust imposed by law on the executor of an estate. Further, we believe that

the evidence in this case, aided by the presumptions referred to above, so strongly establishes the want of mental capacity and the existence of fraud and undue influence, that a directed verdict would have been required.

It is, therefore, submitted that the judgment of the trial court should be affirmed.

Respectfully submitted,

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