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Walker Bank and Trust Company, Administrator of the Estates of Minnetta Walker, Also Known As Nettie Walker, Deceased, and Ila Minnetta Walker, Deceased, and John A. Walker, Deceased, and R. E. Walker, Roma Walker Grock and Alta Fay Walker Lake and Austin Walker v. J. B. Walker : Brief of Plaintiffs-Appellants

IN THE SUPREME COURT
OF THE STATE OF UTA

WALKER BANK AND TRUST COMPANY, Administrator of the Estates of MINNETTA WALKER, aka NETTIE WALKER, deceased, and ILA MINNETTA WALKER, deceased, and JOHN A. WALKER, deceased, and R. E. WALKER, ROMA WALKER GROCK and ALTA FAY WALKER LAKE,

Plaintiffs-Appellants

and

AUSTIN WALKER,

Involuntary Plaintiff

vs

A. B. WALKER,

Defendant-Respondent

Brief of Plaintiffs-

Appeal From Judgment of the [illegible] County

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IN THE SUPREME COURT OF THE STATE OF UTAH

WALKER BANK AND TRUST COMPANY, Administrator of the Estates of MINNETTA WALKER, aka NETTIE WALKER, deceased, and ILA MINNETTA WALKER, deceased, and JOHN A. WALKER, deceased, and R. E. WALKER, ROMA WALKER GROCK and ALTA FAY WALKER LAKE, *Plaintiffs-Appellants,* and AUSTIN WALKER, *Involuntary Plaintiff,* vs J. B. WALKER, *Defendant-Respondent.*	Case No. 10286

Brief of Plaintiffs-Appellants

NATURE OF THE CASE

This is a civil action by which plaintiffs-appellants originally sought to have a constructive trust in their favor imposed upon certain parcels of real property,

record title to which was in defendant-respondent. The real property constitutes the bulk of the estate of John A. Walker, Deceased, and the parties are his heirs, or their personal representatives.

The complaint alleged defendant acted on behalf of plaintiffs, or their predecessors in interest, in recovering title to the real property after it had been taken by creditors through mortgage foreclosures or execution sales (R. 1, para. 6 and 12). By his answer, defendant denied any trusteeship or any beneficial interest in plaintiffs or any of them (R. 9-10).

Thereafter, a written agreement between the parties (Exh. P-7) was located supporting plaintiff's contentions. By the time of pre-trial, defendant had admitted the genuineness of this 1922 agreement (R. 76-78), which provided that he should have only a lien in the property and that his lien should be limited to the amount he personally paid in satisfying certain previous liens against the property, plus interest.

Trial proceeded on the theory that defendant held title only to secure his lien and subject to an obligation to convey the property to his co-heirs when the amount of his lien had been paid to him. The purpose of the trial was to determine the amount of defendant's lien and to enforce his obligation to make appropriate conveyance upon the satisfaction of the lien (R. 107; 113).

DISPOSITION IN THE LOWER COURT

The trial court determined the amount of defendant-respondent's lien to be $21,757.36, of which $5,614.00 is

principal and $16,143.36 is interest. It ruled that plaintiffs would have 30 days after demand by defendant to pay this amount, and if the payment were not made within that period, defendant would be released from any obligation to convey plaintiff's property interest to them (R. 83).

In making this determination, the trial court acknowledged that some or all of the $5,614.00 was actually paid by a partnership of which defendant was at most an equal partner with plaintiff R. E. Walker (R. 419; R. 371). The court nevertheless gave defendant full credit for all payments made by the partnership and held defendant was entitlted to interest at 8% per annum from the time those payments were made.

The court failed to make any finding as to the extent to which payments made by the partnership (and for which defendant was given full credit) were made to satisfy obligations which the partnership had to the Estate of John A. Walker, Deceased, although it was the contention of plaintiffs that the partnership had used at least $1,250.00 of the $5,614.00, and therefore, by paying $1,250.00 of the total was only fulfilling its obligation to repay.

The court further held that, upon defendant's purchase, in June of 1959, of plaintiff R. E. Walker's stock in a corporation which had acquired some of the assets of the partnership, defendant acquired any right R. E. Walker might have had to be reimbursed for payments made by the partnership in the acquisition of the property involved in this case.

RELIEF SOUGHT ON APPEAL

Plaintiffs-appellants seek to have the cause remanded with instructions to the trial court that it determine the amount of respondent's lien by the following adjustments to its decree:

(a) Deduct $1,250.00 from the $5,614.00 principal amount in the decree. This is one-fourth of the $5,002.50 paid by the partnership to persons named Dayton on a mortgage obligation, and represents $1,000.00 borrowed by the partnership for its business purposes on June 4, 1918. The partners used the estate property as security for the loan, giving a mortgage on it (Exh. P-28; Entry 28 of Exh. D-30). One-fourth of the money borrowed on the Dayton note and mortgage had been used to pay off this $1,000.00 indebtedness. (R-228)

(b) Deduct from the balance 58.318 per cent of whatever amount was actually paid by the partnership (as opposed to defendant personally) in satisfying the liens to which the 1922 contract relates. The 58.318% represents the interest of R. E. Walker in the partnership capital as of the time the partnership discontinued its active business operations, and making this deduction would give defendant reimbursement for his share of the partnership's payments.

(d) Deduct $250.00 from the remaining principal amount by reason of a payment received by respondent in 1942 for a right of way over the subject property granted to West Side Water System (Entry 106, Exh. D-30), and adjust the interest computation for this 1942 receipt by defendant.

(c) Recompute the interest payment on the principal sum arrived at by the foregoing adjustments.

In the alternative, appellants seek to have this Court modify the Decree relative to the amount due respondent on his lien to a total of $6,436.31, consisting of principal in the amount of $1,394.67 and interest in the amount of $5,041.64. These amounts are arrived at as follows:

Principal Amount of Respondent's per Decree		$5,614.00
Less: Partnership obligation satisfied with proceeds from Dayton note and mortgage		($1,250.00)
Balance		$4,364.00
Less: R. E. Walker's Share of partnership capital per partnershi pbooks, not recoverable by respondent (58.318% of $4,364.00)		($2,545.00)
Balance		$1,819.00
Less: Amount received by Respondent for right of way		($ 250.00)
Balance		$1,569.00
Plus: Interest as follows:		
8% of $1,819.00 for 20 years (1922-42)	$2,910.40	
8% of $1,569.00 for 22 years (1942-64)	2,761.44	
Total Interest		$5,671.84
Total Amount of respondent's expenditures and interest		$7,240.84
Eight-Ninths of Above figure=$6,436.31.		

from 1919 until 1924 when he got married. He was running the teams and working on the farm. J. B. Walker had several jobs until 1920 when he devoted his full effort to the hauling business (R. 387; R. 218). The nature of the entity which operated the hauling business was not expressed in any formal instrument, but the business was known as the J. B. and R. E. Walker Trucking Company (R. 362), and was represented to be a partnership of J. B. Walker and R. E. Walker (R. 222-223; R. 383).

In 1917, the business obtained a truck, and Minetta Walker mortgaged a portion of the family property to obtain loans for this purpose (Exh. P-29, R. 220). Thereafter, another truck was acquired, and J. B. and R. E. Walker mortgaged their interest in the estate property to obtain the down payment for this truck in the amount of $1,000.00. (Exh. P-28; R. 221; R. 183; R. 378). The latter mortgage was placed on the property in June of 1918 (Exh. P-28).

On July 12, 1920, a mortgage covering the orange property was given to secure a $4,000.00 loan made by all of the heirs of John A. Walker. (Entry 39 of Exh. D-30). Of the $4,000.00 obtained, $1,000.00 was used to discharge the mortgage of J. B. and R. E. Walker which had been placed on the property to get the second truck. (R. 228; R. 183; Marginal Release, Exh. P-28). This mortgage of July 12, 1920, will be referred to as the Dayton mortgage in this brief. Having used $1,000.00 of the $4,000.00 received on the Dayton note and mortgage to discharge their debt for the truck, J. B. and R. E. Walker's truck-

ing partnership had a clear duty to pay off at least one-fourth of the Dayton mortgage debt.

The Dayton mortgage was not paid and a judgment was entered in January of 1922. The property was sold at a sheriff's sale on February 10, 1922 to Mr. Dayton (Entry 96 of Exh. D-30).

In September of 1919 and April of 1922, two judgments were rendered against the Union Co-operative Mercantile Company (the store was operated by the family in this name) in favor of the Utah Association of Credit Men, and the green parcels of land were subsequently sold on a sheriff's sale for $250.00 and $25.00 respectively (Entries 53 and 56 of Exh. D-30).

In this setting, the family entered into the agreements which are dated October 9, 1922 (Exh. P-5, P-7). One of these is between members of the family and the Daytons which is a contract for the purchase by the family of the orange tract of land from the Daytons, directing that a deed running to respondent be delivered upon final payment of a purchase price of $5,002.50. The other contract is between the members of the family themselves which provides that respondent will make a diligent effort, although he is in no sense obligated, to pay the Dayton mortgage, expenses of administration of his father's estate and expenses in pursuing a condemnation case which was then pending. The contract also provided that respondent would have a lien against the property for all "payments made by second party [respondent] pursuant to the terms of this agreement."

Although there is some question about when the signatures of the parties were affixed and by whom, the adult members of the family entered into the contract.

Without question, the Dayton obligation was satisfied. Further, the Union properties were assigned to respondent by sheriff's deeds. There is also no question about the source of these payments. Essentially all of the moneys paid for these properties came from the trucking business. (R. 228-229; R. 362). The books of account of the J. B. and R. E. trucking company partnership show the properties as partnership assets. (Exh. D-26; Exh. P-27; Exh. P-32; R. 235)

When partnership funds were expended for the purpose for which respondent seeks to establish a lien in the amount of the entire expenditure, the expenditures were set up on the books as partnership real estate and were not charged to respondent's capital account. (R. 272-273).

All of the family continued to live in the family home until 1920, when Fay Walker left. In 1924 R. E. Walker was married and moved out of the home. (R. 309; R.211) J. B. Walker and his family lived in the home with his mother and the younger children until 1931. (R. 211)

In July of 1933, a corporation, J. B. and R. E. Walker, Inc. was formed. Five Thousand shares of $1.00 par were issued, mainly to J. B. and R. E. Walker. According to the Articles of Incorporation, the corporation received, as consideration for the shares so issued, exactly this:

"The good will and business created by the co-partnership of J. B. and R. E. Walker." (Exh. D-25)

At the corporation's inception, there were no ledger accounts established, and the only book ever maintained was a cash book, which did not show the assets and liabilities of the business. (R. 267-268).

The only indicia of ownership of partnership assets which were transfered to the corporation were the certificates of title to the trucks as they were registered for license plates. (R. 195; R. 259). The stocks and securities of the partnership were not transferred to the corporation (R. 194; R. 404-405) No conveyance of the John A. Walker Estate property was ever made to the corporation by any instrument, recorded or otherwise.

As of December 31, 1932, the last time that partnership entries were made, the capital account of J. B. Walker amounted to $29,143.30 and that of R. E. Walker was $40,775.01 (R. 272). Of the total capital in the partnership, R. E. Walker had 58.318 per cent, and J. B. Walker had 41.682 per cent. The corporation stock was issued equally to J. B. and R. E. Walker (Exh. D-25).

Mr. Cope, a certified public accountant, testified that he had examined the books of the partnership and records of the corporation over an extended period between March 1958 and September 1958, and that he had attempted to reconcile the ending of the partnership with the beginning of the corporation. He found that the two could not be reconciled (R. 277).

In 1959, J. B. and R. E. Walker were involved in a law suit with one another as a result of which respondent bought all of R. E. Walker's stock in the J. B. and R. E. Walker, Inc. The purchase was made pursuant to a written agreement between them (Exh. P-31). The agreement (1) recognized that there was still a partnership having assets subject to conveyance, and (2) provided specifically that respondent was not getting any rights in the property of the John A. Walker Estate. The settlement was worked out carefully between the parties and their counsel and, with most particular language, reserved R. E. Walker's rights in the estate property from the assignment.

Disregarding the clear intent of the parties expressed in the agreement, the trial court ruled that by this agreement respondent bought out R. E. Walker's interest in the partnership without any reservations. Since the partnership had made the payments for the acquisition of the orange property from the Daytons and the green property from the Utah Association of Credit Men, the court concluded that the assignment in the 1959 agreement gave respondent the right to reimbursement, under the 1922 agreement, for all moneys paid by the partnership. The trial court refused to permit counsel to examine respondent regarding which payments were made by him and which were made by the partnership (R. 371). The court ignored the extensive provisions of the 1959 agreement expressly reserving from the assignment the rights to reimbursement for moneys paid on behalf of the John A. Walker Estate.

Following the trial court's ruling on the effect of the settlement agreement, plaintiffs asked leave to amend the complaint to assert a bar of the statute of limitations against respondent's lien including any moneys paid by the partnership, the corporation, or R. E. Walker (R. 385).

The partnership books of account clearly show the properties acquired by payments made to the Daytons (which amounted to $5,002.50 of the $5,614.00 in the decree) were picked up and carried as a partnership asset. Similarly, the $426.40 awarded in the decree for the two Union lots (green property) resulted in an acquisition shown as an asset of the partnership. (Exh. D-26; R. 235).

ARGUMENT

POINT I

THE TRIAL COURT ERRED IN FAILING TO SET-OFF AGAINST AMOUNTS PAID BY THE PARTNERSHIP AT LEAST $1,250.00 WHICH THE PARTNERSHIP HAD THE PRIMARY DUTY TO PAY.

The Dayton mortgage represented security for a $4,000.00 loan made upon the note of all the heirs of John A. Walker, Deceased. There is no conflict in the evidence that, when the money was obtained in 1920, $1,000.00 (one-fourth of the $4,000.00) was required to discharge a previous mortgage placed on the property by respondent and appellant R. E. Walker (Entry 39 of Exh. D-30; Exh. P-28; R. 183; R. 228).

Similarly, there is no conflict in the evidence that the mortgage placed on the estate property by respond-

ent and R. E. Walker in June of 1918 was to obtain $1,000.00 for a truck used in the partnership business (R. 221; R. 183).

It would therefore appear clear that, at the moment the Dayton mortgage was placed upon the property, the heirs of John A. Walker would have a claim against the partnership and J. B. and R. E. Walker for the $1,000.00 debt which had been paid off.

Following the Dayton foreclosure, the reacquisition of the property by respondent was made with partnership funds. (See stipulation of counsel at page 371 of the Record; Exh. D-26; R. 235)

The trial court plainly stated its conviction that respondent should be given credit for all payments made by himself or the J. B. and R. E. Walker Trucking partnership (R. 370). Further, the court did not permit any set-off for the obligations of the partnership to the John A. Walker estate. The propriety of the trial court's ruling relative to giving respondent credit for all payments made by the partnership will be argued in another point. At this point the merits of the set-off will be discussed.

The 1922 agreement among the members of the Walker family (Exhibit P-7) constitutes a memorandum of the understanding between respondent on the one hand and his mother and siblings (some of whom were still minors) on the other. It obligates respondent to do nothing except use his best efforts to clear up the Day-

ton mortgage matter and other specified expenses. It is a personal agreement with respondent providing for his reimbursement with interest of money which he pays out of his own pocket. It gives him a lien against the property for sums which he pays. It says nothing about the establishment of a lien in the event the partnership or anyone else makes any of the payments.

Appellants will concede the equity of giving respondent credit for payments made by the partnership to the extent of respondent's interest in the partnership even though such payments were not technically made by him within the purview of the 1922 agreement. However, this credit should be given only after the total payments made by the partnership have been reduced by the amount which the partnership owed to the estate.

The evidence clearly establishes that, by 1918, the trucking business was operated as a partnership between respondent and R. E. Walker. In March of that year, they represented themselves to be a partnership in a proceeding before the Industrial Commission (R-222, 223; R. 283). In June of 1918, they jointly executed a mortgage of their interest in the John A. Walker Estate above referred to so they could acquire a truck (Exh. P-28).

It appears from the record that the partnership owed the John A. Walker Estate and the family a great deal more than the duty to pay back money borrowed for use in the business. The partnership initially used the farm animals and farm equipment for hauling; it used the estate land as security in borrowing money for

trucks, and it used the land as its base of operations, feeding and sheltering its teamsters. The partners themselves owed a great deal to the family, which had put them through college despite serious financial hardships, and was providing them with their own residences. The store had also served the partnership by providing supplies and gasoline. (R-216, 214, 220, 221, 226, 227)

The value of these goods and services cannnot now be established, and the trial court saw no legal duty of the partnership to pay for them. However, as to the $1,000.00 of the Dayton mortgage money which was used to discharge the partnership's debt, both the amount and the direct benefit are clearly established from the evidence. The 1922 contract cannot logically or even rationally be construed to mean that respondent should have a lien against the estate property if the partnership repaid the $1,000.00 of the Dayton mortgage money which was used to satisfy its own previous note and mortgage.

The ruling of the trial court goes even one step further. It provides that respondent is entitled to have the heirs of John A. Walker not only reimburse him for the money paid by the partnership to discharge its own obligation, but also pay him 3.36 times the amount of this payment in interest.

It should be noted that the decree gives respondent credit for $5,002.50, being the principal amount the partnership paid the Daytons. Since one-fourth of the Dayton mortgage money went to the benefit of the partnership, the off-set should be one-fourth of the $5,002.50

credit given respondent by the trial court's decree, or $1,250.00.

We submit that the trial court erred in not allowing a set-off of $1,250.00 against the $5,614.00 principal amount determined to be due respondent.

POINT II

THE TRIAL COURT ERRED IN HOLDING THAT RESPONDENT HAD ACQUIRED ALL OF THE PARTNERSHIP'S RIGHTS IN THE PROPERTIES OF THE JOHN A. WALKER ESTATE.

The evidence offered in the trial of this case is uncontroverted that all monies paid for the re-acquisition of the properties covered by the Dayton mortgage and those included in the Utah Association of Credit Men execution sale were from the Walker Trucking Company co-partnership, in which respondent and appellant R. E. Walker were partners. (R. 257; R. 235; Stipulation of counsel R. 371, Exh. D-26 at page 21.)

The trial court repeatedly expressed its conviction that respondent had finally bought out R. E. Walker in the partnership which paid the $5,614.00 here in issue, and had therefore acquired any right his partner had to be reimbursed for partnership funds expended for the John A. Walker Estate. At page 370 of the record, the court said:

> "I am going to hold that any money that's been paid by the partnership or the corporation or J. B. Walker he is entitled to get eight-ninths of it back."

Again, at page 412 of the record, the court said:

> "He may have paid for it by partnership funds, but he has bought his partner out."

Also at page 366-7 of the record, we find:

> "MR. CUTHBERT: The only reason for presenting Mr. Cope's evidence was in rebuttal of Mr. Walker's statement that he had charged all the items to draws that had been paid by the partnership.
>
> "THE COURT: This is what I understand, and I did not think that made any difference because he's bought R. E. Walker out, and he's paid all that's been paid on this."

The evidence in this case will not sustain a finding that respondent ever acquired the rights of his partner, Appellant R. E. Walker, to be reimbursed for amounts expended by the partnership for the estate nor that the property interests of the partnership in the John A. Walker Estate properties were ever transferred to J. B. and R. E. Walker Incorporated.

Looking first at the question of whether the partnership's interest in the John A. Walker Estate properties was transferred to the corporation, there are several factors indicating no transfer was ever made or intended to be made.

First, there was no conveyance of any form from J. B. Walker, who took record title to the properties, to the corporation (Exh. D-30; R. 192-3). Although a holding of property in the name of one partner is consistent with its being a partnership asset under Section

10 of the Uniform Partnership Act. (Section 48-1-7, Utah Code Annotated, 1953), such a holding is not consistent with a corporation's ownership of an asset.

Second, although the partnership books clearly show these assets to be partnership assets, there is no accounting record by which the properties are treated as a corporate asset.

Third, the Articles of Incorporation specifies that the corporation is receiving, in payment for the shares issued, "the good will and business created by the copartnership of J. B. & R. E. Walker." This language makes no reference to the transfer of any tangible assets of the partnership, nor is it in the broad form frequently found in such documents of all of the assets and liabilities of the partnership. The language used is consistent with a transfer of only the operating assets of the partnership without a transfer of the investment assets.

Fourth, the capital accounts of J. B. Walker and R. E. Walker were not equal at the time of incorporation. R. E. Walker's capital account amounted to $40,775.01 and J. B. Walker's was $29,143.30 (R. 272). The stock of the corporation was issued equally (Exh. D-25). This issuance of equal stock would be consistent with an incorporation of only part of the assets of the partnership which would result in withdrawals from each of the partner's capital accounts of an equal amount, but not with an incorporation of all of the assets of the partnership.

Fifth, Mr. Cope, a certified public accountant, who worked on the corporation books extensively in 1958,

in attempting to reconcile the assets of the partnership with those of the corporation, testified that from an accounting standpoint it was not possible to reconcile the corporation as being a successor of the partnership. (R. 277)

Sixth, the testimony of respondent is that he did not make a transfer of any of the indicia of ownership of the real property involved in this action, or the stocks and bonds of the partnership (except for a few shares of one company). He testified that he had transferred the titles of the equipment. (R. 192-5). This is consistent with the testimony of Appellant R. E. Walker that only the equipment and operating assets of the partnership were transferred to the corporation (R. 259).

Seventh, the agreement of respondent and R. E. Walker, in settlement of their lawsuit, contains an agreement by R. E. Walker to assign to respondent his interest in the partnership, except for the properties involved in this action (Exh. P-31). This is clearly indicative that in June of 1959 the parties considered that the properties in this action and other assets were still in the partnership. If all assets of the partnership had been transferred to the corporation, there would have been no occasion to get an assignment and deed from R. E. Walker of his interest in the partnership.

It is submitted that there was no transfer of the properties involved in this action from the partnership to the corporation, and that the court erred in so finding.

Therefore, by acquiring the corporate stock of R. E. Walker, respondent could not have acquired the rights to reimbursement even if the agreement by which he acquired R. E. Walker's stock had been silent on the subject.

The agreement of June, 1959, was *not* silent on the subject (Exh. P-31). It contains paragraphs which are most pertinent and enlightening as to the parties' understanding about the rights of reimbursement. First, they recognized that the partnership retained some assets, and particularly those relating to the John A. Walker estate property and the Union property. The agreement of R. E. Walker in that instrument reads as follows:

> "2. [R. E. Walker agrees] to assign and quitclaim any interest he has in the old partnership known as Walker Trucking Co. and in the Walker Sand and Gravel, a co-partnership, except that nothing herein contained shall be construed as a waiver on the part of the party of the second part [R. E. Walker] of any claims he may have to the John Alvin Walker Estate or the Union property as mentioned in paragraphs 3 and 4 of the mutual covenants.

Secondly, the parties to the agreement anticipated the very issue which is now in litigation—to what extent should respondent get credit against the estate for payments made by the partnership to acquire or maintain the estate property by reason of acquiring R. E. Walker's interest in the corporation? It is difficult to conceive how the understanding that respondent should *not* acquire any additional rights could be more clearly stated that in the following two sections of the agreement:

"3. It is understood and agreed that there is expressly reserved and excluded from the terms and provisions of this agreement, and from any releases executed incident thereto, all interest that the parties hereto may have or claim to have in the property of the John Alvin Walker Estate, and that nothing herein contained shall be regarded or construed as an admission on the part of either party that either or both of said parties shall have, or has, any right title or interest in or to said property, and that said property, and all incidents thereof including any and all matters, *or to source of funds involved in the acquisition or maintenance of said property,* are retained by the respective parties the same as though this agreement were never made."

"4. It is understood and agreed that there is expressly reserved and excluded from the terms and provisions of this agreement, and from any released executed incident thereto, all interest that the parties hereto may have or claim to have in two pieces of real estate in Union, Utah, and that nothing herein contained shall be regarded or construed as an admission on the part of either party that either or both of said parties shall have, or has, any right, title or interest in or to said property and that said property, and all incidents thereof, including any and all matters, *or to source of funds involved in the acquisition or maintenance of said property,* are retained by the respective parties the same as though this agreement were never made." [Emphasis added.]

Considering that approximately one-half of the agreement, exclusive of recitals and property descriptions, is devoted to the above language, one must assume that the parties felt the above language an important

part of their negotiations. Nevertheless the trial court completely ignored the agreement and the result the quoted language sought to accomplish between the parties, and refused to listen to evidence relating to the understanding (R. 371). The court sustained objections to introduction of this evidence, so an offer of proof was made (R. 371).

In view of the overwhelming evidence and virtual stipulation that all of the expenditures for which respondent claims a lien were made by the partnership, and in view of the great care with which R. E. Walker retained his rights to reimbursement for his share of partnership expenditures for the estate, we submit that the trial court erred in holding that respondent had acquired the right to reimbursement for all money paid by himself, the partnership or the corporation the same as if he had made all the payments out of his own pocket.

As noted above, the capital accounts of the partnership at the time of incorporation of the corporation stood with respondent having 41.682 per cent of the net worth of the partnership and R. E. Walker having 58.318 per cent. The incorporation of certain assets of the partnership, with the stock for those assets being issued equally, would result in equal reductions in the dollar amount of each partner's capital account. The dollar difference in the capital accounts after such withdrawal would be a greater percentage of the whole net worth of the partnership, so the effect would be to increase R. E. Walker's percentage of the capital and reduce respondent's. Since the evidence is not available as to how

much was in fact withdrawn from the partnership, appellant's contend the principal amount of respondent's lien should be reduced by at least 58.318 per cent.

POINT III

EVEN IF DEFENDANT RESPONDENT HAD ACQUIRED ALL HIS PARTNER'S RIGHTS TO REIMBURSEMENT BY THEIR 1959 AGREEMENT, THE COURT ERRED IN HOLDING DEFENDANT RESPONDENT WAS ENTITLED TO INTEREST FROM 1922 INSTEAD OF FROM 1959 WHEN HE ACTUALLY PAID THE MONEY FOR REIMBURSEMENT RIGHTS.

The trial court appeared to recognize that any claim defendant respondent might make to having "bought his partner out" must be based on the 1959 agreement between them (Exhibit P-31).

Assuming (although this violates the letter and spirit of the agreement) that defendant-respondent somehow acquired his partner's rights to reimbursement by that agreement, we would point out that his partner, plaintiff appellant R. E. Walker, had no rights of any kind under the 1922 contract which is the basis of this litigation. The only party to the 1922 contract who has rights to reimbursement is defendant respondent and he is entitled to reimbursement with interest from his co-heirs but only for amounts he personally pays. He is only entitled to interest, furthermore, from the date he personally makes an expenditure on behalf of the estate and is consequently "out of pocket."

Defendant-respondent was certainly not out of pocket with reference to expenditures made by R. E. Walker

(either as an individual or as the major partner in the J. B.-R. E. Walker partnership) until he (by the trial court's incredible construction of Exhibit P-31) bought whatever rights R. E. Walker had in 1959. Defendant respondent should not, in equity, be given credit for his 1959 expenditure as if he had made it in 1922.

We would re-emphasize that R. E. Walker had no rights under the 1922 contract. If J. B. Walker acquired R. E. Walker's rights to reimbursement (despite R. E. Walker's consistent attempts to retain those rights), the rights so acquired have their basis in general principles of law and not in the 1922 contract. There is no possible basis on which R. E. Walker could have been entitled to reimbursement plus interest at 8 per cent since the legal rate of interest is only 6 per cent.

In making this argument, we do not retreat, of course, from our basic position (1) that no rights with reference to the estate property were ever conveyed to the corporation, (2) that R. E. Walker preserved for himself all rights to reimbursement derived from his share of partnership money used for estate purposes and (3) that, by acquiring all the stock in the corporation, defendant-respondent could not have acquired any rights with reference to the estate property.

POINT IV

THE COURT ERRED IN DENYING PLAINTIFFS-APPELLANTS' MOTION TO AMEND THE FINDINGS AND JUDGMENT TO PROVIDE THAT, IN THE EVENT PLAINTIFFS-APPELLANTS FAILED TO PAY THE AMOUNT OF DEFENDANT-RESPONDENT'S LIEN WITHIN THIRTY

DAYS AFTER DEMAND, THEN DEFENDANT-RESPONDENT SHOULD BE ENTITLED ONLY TO FORECLOSE HIS LIEN.

The history of the Walker family possession of the property in litigation has (since the Dayton mortgage and other liens were discharged) been that Minnetta Walker, the mother of the living litigants, occupied the home and exercised some dominion over it until her death in 1959 at the age of eight-six. For about ten years after the 1922 agreement, defendant-respondent and his wife and family lived in the home too (R-211). All the children assumed that, when their mother died, an equitable division of the property would be made with appropriate consideration being given to the 1922 efforts of the two oldest children to preserve the estate.

It was not until 1960, after Minetta's death, that the intention of defendant-respondent to disenfranchise his brothers and sisters became known. It was not until after the judgment in this action was filed that demand was made upon plaintiffs-appellants to produce the $20,000.00 which the Court had found to be the amount of the lien.

The property in litigation has been appraised at approximately $80,000.00 but the interest of plaintiffs-appellants is an undivided interest, and the lands are for the most part unimproved. As a matter of banking practice, loans on unimproved lands are not made, particularly where the prospective borrower can only encumber an undivided interest. The trial court decreed that, if plaintiffs-appellants failed to raise $20,000.00

within thirty days after demand, their entire interest should be forfeited, and defendant-respondent would then hold the entire estate free of any claim by them.

The practical effect of the decree is to work a forfeiture of the interests of all the heirs of John A. Walker except defendant-respondent. This is most certainly not the spirit or the content of the 1922 agreement. That agreement provides that defendant-respondent shall have a lien only, a lien which he might establish at any time by making demand on his co-heirs for payment, but nonetheless a mere lien.

Recognizing the imminence of forfeiture, plaintiffs-appellants moved (R-86, 87) to have the judgment amended, and the Court denied the motion.

In essence, the deed by which defendant-respondent acquired his title was a mortgage of a kind which this Court has often recognized (*Bybee* v. *Stuart,* 112 Utah 462, 189 P.2d 118;*Hess* v. *Anger,* 53 Utah 186, 177 Pac. 232). His lien is an obligation established by an instrument in writing which did not, in terms, contemplate any conveyance to defendant-respondent.

The procedure for the recovery of a debt or the enforcement of a right secured by a mortgage upon real estate is statutory, in this state, and the statutory foreclosure procedure is the only procedure by which a lien may be enforced. Section 78-37-1, U.C.A. 1953 reads as follows:

> "There can be but one action for the recovery of any debt or the enforcement of any right se-

> cured by mortgage upon real estate or personal property, which action must be in accordance with the provisions of this chapter. Judgment shall be given adjudging the amount due, with costs and disbursements, and the sale of the mortgaged property, or some part thereof, to satisfy said amount and accruing costs, and directing the sheriff to proceed and sell the same according to the provisions of law relating to sales on execution, and a special execution or order of sale shall be issued for that purpose.

When the trial court denied the motion to amend the judgment to require foreclosure and persisted in its decree that the substantial interest of plaintiffs-appellants be forfeited without hope of redemption unless they produce a sum it is not in their power to produce, the Court acted against the law and against fundamental principles of jurisprudence.

POINT V

THE COURT ERRED IN HOLDING THAT, BY ACQUIRING ALL OF THE STOCK IN J. B. AND R. E. WALKER, INC., DEFENDANT-RESPONDENT ACQUIRED ANY RIGHTS TO REIMBURSEMENT FROM THE ESTATE OF JOHN A. WALKER SINCE ANY RIGHTS OF THAT CORPORATION—WHETHER ACQUIRED FROM THE R. E.—J. B. WALKER PARTNERSHIP OR OTHERWISE — WERE BARRED BY THE STATUTES OF LIMITATIONS.

As we have pointed out in argument under previous points, the Court repeatedly held that defendant-respondent should have credit for all expenditures contemplated by the 1922 contract whether they were in fact made by himself, the J. B.-R. E. Walker partnership or J. B. and R. E. Walker, Inc.

The Court's theory, if we understand it, is that the partnership was entitled to be reimbursed for expenditures made by it on behalf of the estate — quite apart from the 1922 agreement — and defendant-respondent acquired those rights when he acquired the total stock in the corporation.

We have already pointed out that the corporation never acquired R. E. Walker's or the partnership's rights with reference to the estate. Those rights were never conveyed to the corporation, and they were, in fact, carefully preserved to plaintiff-appellant R. E. Walker in every account, record, contract and written transaction. The trial court simply ignored the mass of written evidence that defendant-respondent had not personally paid the Dayton mortgage and had not acquired the rights to reimbursement of the partnership, which really paid it, or plaintiff-appellant R. E. Walker. The trial court would not even receive evidence of the extent to which payments had been made out of partnership funds.

Even if, by acquiring the total issued stock, defendant-respondent had acquired whatever rights the partnership or corporation had, however, we submit that neither entity had any rights.

Neither the partnership nor the corporation was a party to the 1922 contract and there is no instrument establishing the right of either to sit on its rights to reimbursement or to have a lien in the property. Each had a legal or equitable right to be reimbursed by the

estate for expenditures made on the estate's behalf. Neither made a claim, however, within six or even ten years after the expenditure was made. Defendant-respondent could not, by acquiring the corporation's stock, acquire any right the corporation did not then have. The corporation's rights, if any it ever had, had long since become unenforceable by reason of the limitations of actions provisions of the Utah Code. We assume Section 78-12-25 would be the applicable provision, but we are aware of no kind of action which may be asserted forty years after it arises.

CONCLUSION

Plaintiffs-appellants do not seek to keep from defendant-respondent any profit or advantage to which he is entitled under the 1922 contract. To the extent that he was out of pocket in arranging for the payment of the Dayton mortgage and the other expenditures which are the subject of the 1922 contract, plaintiffs believe he should be fully reimbursed with interest.

Plaintiffs-appellants cannot agree, however, that defendant-respondent should be reimbursed for expenditures made by someone else. They are even willing that he should be given credit for having paid a part of the amounts really paid by the partnership. No possible basis is seen, however, for crediting defendant-respondent with all the payments made by the partnership, particularly when his partner made so careful a record of the understanding between the partners that defendant-respondent should *not* be given such credit.

We propose an entirely equitable formula for determining the amount of defendant's lien. We believe the evidence is clear and convincing that one-fourth of the money raised by the Dayton Mortgage was used to satisfy a partnership mortgage. One-fourth of the $5,002.50 paid to recover the property from the Daytons was therefore a partnership obligation, and defendant should get no credit for the partnership's having paid that.

Of the remaining $4,364.00, defendant should get credit only for the part of it which would have been distributed to him if it hadn't been so expended. On the basis of the partnership's capital accounts, it is assumed his share would have been 41.682 per cent.

The record shows that defendant-respondent received $250.00 for granting a right of way across the property. We believe this amount should be deducted from the amount of his lien.

Finally, we believe the rights of the plaintiffs-appellants should not be subject to forfeit if they cannot produce the amount of the lien. We believe the lien should be foreclosed in the manner provided by statute.

Respectfully submitted,

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