

1965

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 Defendant-Respondent

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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,
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 WALK-
ER LAKE,

Plaintiffs-Appellants,

and

AUSTIN WALKER,

Involuntary Plaintiff,

— vs. —

J. B. WALKER,

Defendant-Respondent.

Case
No. 10286

FILED

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Clerk, Supreme Court, Utah

Brief of Defendant-Respondent

APPEAL FROM JUDGMENT OF THE
THIRD JUDICIAL DISTRICT COURT

H ARNOLD RICH
510 American Oil Building
Salt Lake City, Utah

and

MAX K. MANGUM
206 El Paso Natural Gas Building
Salt Lake City, Utah

*Attorneys for
Defendant-Respondent*

FRANK J. ALLEN and
THOMAS C. CUTHBERT
351 South State Street
Salt Lake City, Utah

Attorneys for Plaintiffs-Appellants

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Brief of Defendant-Respondent

STATEMENT OF FACTS

This being an action in equity instituted for the purpose of impressing a trust on the title to real estate known as Tracts A (Dayton) and B (Union Co-op), legal title to which has been in defendant J. B. Walker for

forty-two years, it is essential for this Court to not only review the facts, but also to review the evidence in its context, not thrown in haphazardly and piecemeal as appellants have sought to do in their statement of the case and statement of the facts. We deem it therefore necessary to a proper presentation of this case and to a clear understanding of the findings and decision of the Trial Court that defendant J. B. Walker restate the facts in context.

For purposes of identification, reference was made throughout the trial to the plat (Ex. P-22) (R- 102-104). The area in orange is the tract referred to in the testimony as the Dayton tract (R. 103) acquired by defendant J. B. Walker from Dayton, also referred to as Parcel A in the Complaint. The areas in green are the tracts that were in the name of Union Co-op and were acquired by defendant J. B. Walker from the Utah Association of Credit Men (R. 103-104). Those areas are referred to as Tract B in the Complaint.

The areas in blue still stand on the records in the name of John A. Walker, whose estate has been in probate since 1912, and is involved only to the extent that defendant has paid the taxes on it for which he claims credit, and it is material because H. A. Smith (father of Alma Smith) was handling the probate proceedings at the same time that he was also handling a condemnation proceeding brought by Salt Lake County to acquire a right-of-way through a portion of the estate property and Dayton tract for canal purposes. He was also

representing the Walkers in the action brought by Dayton and the Association of Credit Men to foreclose and sell out the family home and the store. It was that litigation and the family attempt to salvage the family property that caused the heirs, including plaintiffs and their mother, who is now dead, to execute in 1922 the agreement (Ex. 7) which was prepared by Mr. Smith, Sr. and was then signed by the members of the family, and which Mr. Smith proceeded to place in his safe, where it was altogether forgotten by everyone now alive. Apparently no one knew of its existence as a signed document until it was unearthed by Alma Smith, the son of H. A. Smith, just prior to the time of pre-trial hearing (R. 160-161). It is essential that this background be understood by this Court; otherwise the conduct of the parties during this period of forty-two years is altogether incomprehensible. The plaintiffs were unaware of its existence when they filed this action, and denied its existence (R. 254-256). When shown a copy of it at the time of taking the deposition of J. B. Walker, the attorney for plaintiffs denied that it had ever been signed (P. 28 of the deposition of J. B. Walker), and the principal witness for plaintiff, R. E. Walker, denied that he had ever seen it or had ever signed it when his deposition was taken (R. 254-256). Defendant J. B. Walker was unaware that anyone other than himself had ever signed it (R. 188 and 203), and had been informed by Alma Smith (R. 188) that the document was unsigned.

John A. Walker died in 1912, leaving a family consisting of his widow and six children, the oldest of whom

(J. B.) was twenty years of age; the youngest of whom (Austin) was eight years of age. He also left for the support of this widow and six children the Parcel "A" in question here, which was heavily mortgaged; also a store known as Union Co-op, deep in debt, and with law suits by Z. C. M. I. pending against it (R. 322). Both tracts had been sold by the sheriff, and the period for redemption had expired.

The primary responsibility for feeding the family and paying the debts rested, of course, upon the widow and her two oldest sons, J. B. and R. E. She operated the store until it was taken over by the Association of Credit Men on behalf of Z. C. M. I., and its real estate (Tract B) was sold by execution sale (R. 322). Her two sons finally finished their schooling and they thereafter got jobs and also engaged in trucking activities, finally forming a partnership known as J. B. and R. E. Walker (R. 167).

The widow herself, in her efforts to pay the debts and raise the family, made some mortgages on the property in her name, but finally in 1922 she and the other heirs, in a final effort to save something, turned the entire matter over to the oldest son, J. B. Walker, who was willing to undertake the job of seeing what could be done. That is when H. A. Smith prepared and the heirs signed the document (Ex. P-7), the long forgotten instrument. Thereafter the entire family proceeded to let the entire matter be forgotten until about 1955, when real estate values made the area valuable for subdivision purposes. Defendant J. B. Walker in 1922 made an in-

dependent agreement with Dayton for purchase of the home tract; raised the money to pay him; and on the 19th day of October, 1922, (Ex. D-30, P. 102), received a deed to Tract "A." He also made a deal with the Association of Credit Men, and on the 24th day of August, 1923 (Ex. D-30, P. 61), received a deed to Tract "B."

So the matter has rested for forty years, until this action was commenced on October 16, 1962, to impress a trust on the real property upon the equitable theory that, in acquiring these properties, defendant was acting for and on behalf of the heirs of John A. Walker and as their agent. Defendant J. B. Walker, in his answer (R. 14-15) denied that the effect of his agreement was to create a trust, and alleged affirmatively that the claims of plaintiffs were barred by the Statute of Limitations and laches, and that the rights, if any, of plaintiff, have not been timely prosecuted. He also alleged that the plaintiffs have never at any time in the past offered to do equity by tendering to defendant the moneys expended by him for the acquisition of the property and for taxes and maintenance of the property, and that plaintiffs are not now offering to do equity in that regard and that by reason of their silence and long inaction they are estopped to deny the title of defendant.

The Trial Court had pre-trial hearing (R. 59-66) at which the issues were defined. In the meantime the written document had been found and its genuineness was admitted. Among the things set forth in the pre-trial order is a statement that it is the contention of plaintiffs with

reference to any properties not specifically described in the agreement (Ex. 7), that those other properties were also acquired and management by defendant for the benefit of the members of the family upon the same trust and under the same conditions as those described in the document (R. 61).

J. B. and R. E. Walker operated as a partnership during the 1920's and 1930's until incorporation on July 7, 1933. Immediately prior to incorporation Mr. L. R. Snow, auditor, prepared a balance sheet (Ex. D-24) showing the assets, liabilities and capital accounts of the partnership. Among the assets was listed this real estate as having a value of \$7,550.55. However, Mr. Cope, another auditor produced by plaintiffs, testified (R. 281 and Ex. D-33) that the tax return filed by the partnership, prepared by Mr. Murray Stewart, contained the following notation:

“Partnership returns of the 1920's prepared by Murray Stewart indicated that the original assets were owned by J. B. Walker and merely loaned to the partnership.”

In the Articles of Incorporation (Ex. D-25), all of the partnership assets and business were conveyed to the corporation in full payment of the corporate stock, and thereafter, on June 6, 1959, R. E. Walker assigned and conveyed to defendant J. B. Walker all of his stock in the corporation (Ex. P-31 and Finding of Fact 10; R-73).

The matter of tax payments and source of funds will be discussed under pertinent arguments relating to such matters. There was no actual conveyance by J. B.

Walker of the real estate in question to either the partnership or the corporation, but the real estate was carried on the books of both the partnership and the corporation as assets belonging to them respectively, and Mr. Cope testified that he examined the corporate books for R. E. Walker before the sale of his corporate stock and that, among other documents given to him, was a statement of assets and liabilities (Ex. P-34) showing as assets certain machinery, equipment and real property; also a depreciation schedule showing the real estate and buildings claimed to be owned by the corporation. It was upon that basis that Mr. R. E. Walker sold his stock, after independent investigation and with the aid of a certified public accountant and the advice of his lawyer.

There was considerable testimony pro and con as to the source of funds for acquisition of the property by defendant and for payment of taxes between 1922 and the present time. These matters will be hereafter discussed. The Trial Court found that defendant J. B. Walker was entitled to reimbursement in accordance with the terms of the agreement (Ex. 7).

ARGUMENT

POINT I

THE TRIAL COURT CORRECTLY HELD THAT THE AGREEMENT OF OCTOBER 9, 1922 (EX. P-7) WAS CONCLUSIVE AS TO THE AMOUNT FOR WHICH DEFENDANT J. B. WALKER WAS TO BE REIMBURSED ON ACCOUNT OF REPURCHASE OF THE PROPERTY, AND PROPERLY REFUSED TO

GO BACK OF THAT DATE AND CONDUCT
A FAMILY ACCOUNTING OF CREDITS AND
DEBITS ON THE TRANSACTIONS LEADING
UP TO AND ENTERING INTO THE TRANS-
ACTIONS.

Appellants go to great length in their argument under Point I, to present a computation under the heading "Relief Sought on Appeal" on Pages 4-6 of their brief, in an effort to show what the mathematical result of such a family accounting in 1922 should have been.

There are many things wrong with what appellants are urging. In the first place they are disregarding a basic principal of law that when parties have reduced their agreement to writing and have arrived at an agreement, all prior understandings, conversations and computations are deemed to be merged in the new written document in the absence of fraud. We do not deem it necessary to cite law to this Court on that proposition.

In addition, appellants choose to ignore the evidence, which the Trial Court chose to believe. Between 1912, when the father died, and 1922, defendant had been the mainstay and "breadwinner" of the family. During that period he had paid off several obligations of his mother and had given his mother all of his earnings (R. 183).

The written agreement clearly states the amount of the Dayton claim as \$4,647.84 with interest thereon, and that in the event J. B. is willing to undertake the responsibility and pay off Dayton and other claimants, he is to

be reimbursed for what he has to pay out in accomplishing the desired end. The property was already lost. The period of redemption from Sheriff's Sale had already expired. (See Entry 96 of the Abstract, Ex. D-30.)

The parties were not then interested in a family accounting as appellants now contend they should have been. They were interested in trying to keep a roof over the heads of a widow and six children; and the only member of the family who was willing to undertake that seemingly hopeless task was defendant.

Regardless of how the agreement was forgotten; regardless of how its existence was denied; and regardless of the failure of plaintiffs to assert their rights under the agreement for approximately forty-two years, the effort served its primary purpose. Defendant raised the money; he acquired the home and the store, and the Dayton tract has remained the family home to this day. The agreement does not call for a family audit and expressly sets forth the amount that "J. B." is to be repaid if the family, at some future date, is to acquire an undivided eight-ninth (8/9) interest in it.

The Trial Court correctly applied the law in that regard.

POINT II.

THE TRIAL COURT CORRECTLY RULED
AND FOUND THAT WHATEVER INTEREST
THE PARTNERSHIP (J. B. & R. E. WALKER)
HAD OR EVER HAD IN THE REAL ESTATE,

PASSED TO THE CORPORATION AND THAT NONE OF THE PLAINTIFFS, INCLUDING R. E. WALKER, HAS ANY INTEREST IN THE CORPORATION.

It is most difficult to understand how plaintiffs can pretend to claim any advantage by asserting, as they do under Point II, that in all of those years since 1933 the partnership has retained some residual interest in this property. Plaintiffs, other than R. E. Walker, were never members of the partnership or stockholders in the corporation. It is nowhere claimed or asserted that the partnership, as such, ever had a fiduciary relationship to plaintiffs. The only place where the partnership enters the picture at all is, as set forth in the Complaint, where the allegation is made in Paragraph 14 (R. 3) that plaintiffs shouldn't be required to reimburse anyone for anything because the partnership was, prior to 1922, indebted to the estate of J. A. Walker for moneys advanced, and that the money used to purchase the Dayton tract was in fact paid by the partnership and was but a repayment by the partnership of its debt. This theory is nothing but plain everyday sophistry, and flies right in the teeth of the express wording of the written agreement and the evidence presented to the Trial Court.

Regardless of the conflict in evidence as to when the partnership had its inception, there is no doubt at all as to the relationship of R. E. Walker to this transaction. He is one of the *parties of the first part* in Ex. 7, who acquires the right to buy in, if, as and when "J. B." is successful in his efforts to raise the money and repurchase the lost property. That is the relationship, and the

only relationship, to this property that R. E. Walker retained for himself in his settlement with J. B. in June, 1959. He did not sign with "J. B." as a raiser of funds in 1922, nor does he in 1959 reserve or retain any interest in any funds to be reimbursed to "J. B." The only reservation in 1959 is the right to assert his interest in the property of the John Alvin Walker estate. This is exactly what he is asserting in the Complaint, along with the other heirs, as a beneficiary of an alleged trust; and that is exactly what the Trial Court gave him and what he will get if he puts up his share of the money.

The partnership has been out of existence for thirty years.

Prior to incorporation, regardless of the source of funds for meeting payments to Dayton, and regardless of the issue as to whether, in periodic accounts between the partners, the payments were charged to J. B., it is undisputed in the evidence that the property, after acquisition of Tract "A" from Dayton and of Tract "B" from the Association of Credit Men, was carried on the partnership books as an asset (R. 282). That would be true whether it was owned personally or jointly as a partnership assets. All personally owned assets are liable for partnership liabilities. The tax returns, however, as before stated, carried the notation that the property belonged to "J. B." but was loaned to the partnership.

At the time of incorporation, the property was listed in the balance sheet (Ex. D-24) as an asset of the partnership to be conveyed to the corporation in payment of stock.

The property was picked up by the corporation as an asset and has been carried and used as such for bonding and credit purposes from 1933 to the present time.

During that period from 1933 to 1959 (26 years) R. E. Walker was Secretary and Treasurer of the corporation. He cannot now claim ignorance of such facts. When he parted from "J. B." in 1959 he hired a C.P.A. to make an examination of the corporate books and Mr. Cope produced the document which he used (Ex. P-34) which shows on its face an entry for machinery, equipment, and real property, which included this property, on the schedule attached. When he sold his stock he sold any interest which he ever had as a partner or as a stockholder.

The Trial Court correctly found his issue against plaintiffs. The evidence was overwhelmingly against R. E. on this point.

POINT III.

THE TRIAL COURT CORRECTLY FOUND THAT THE COMPUTATION OF INTEREST COMMENCED WITH 1922.

This point deserves little or no attention. It is such an obvious attempt to play on words that it should be disregarded without comment.

As we read it, it is that J. B. is to be reimbursed *only for what he personally pays out*; and that if he had the partnership make the payments on his behalf and then

charge it to his account in periodic settlements, or if he had the partnership and the corporation pay it and carry it for him, with him ultimately acquiring the entire beneficial interest through stock ownership, that some way, somehow this method of handling it acted as a release for the benefit of plaintiffs from the obligation to pay interest if they wanted to exercise their right to acquire.

Plaintiffs cite no law to such effect because there is none. Excepting R. E., who sold his interest in the partnership for stock and then sold his stock to J. B. for cash, none of the plaintiffs ever at any time had any interest in either of those entities. Their rights and their obligations are contractual as set forth in Ex. 7, and no play on words can be used in a Court of Equity to operate to release them from the proper payment of principal and interest on all amounts paid to acquire the property, regardless of the source of funds from which J. B. obtained them, and notwithstanding any internal accountings used by the bookkeepers for the partnership and the corporation in adjusting equities between the partners or the two principal stockholders.

POINT IV.

THE TRIAL COURT PROPERLY DENIED THE MOTION OF APPELLANTS TO CONVERT THE CASE INTO A MORTGAGE FORECLOSURE ACTION AFTER IT HAD BEEN INITIATED AND TRIED BY PLAINTIFFS AS AN ACTION IN EQUITY TO IMPRESS THE LEGAL TITLE WITH A TRUST IN FAVOR OF PLAINTIFFS.

Plaintiffs' Complaint clearly alleges legal title in defendant; that he acquired such title as an agent acting for and on behalf of Minnetta Walker and the heirs (R. 2-3); that he is holding the title in trust for all of the heirs. Upon that theory the case was defined in the pre-trial order (R. 61), and upon that theory the case was tried. After the Trial Court had announced its decision and had directed the preparation of Findings, Conclusions and Decree in accordance with its decision, then for the first time plaintiffs sought to have the Trial Court change the nature of plaintiffs' claimed relationship with defendant to that of mortgagor and mortgagee from the fiduciary relationship of agency. This the Trial Court properly refused to permit them to do.

Exhibit 7 speaks for itself. A reading of it shows it to be an authorization to purchase the tracts, with a right of the heirs to buy in upon payment of eight-ninths (8/9) of the purchase price, together with interest and all necessary costs incurred by defendant. One thing is certain, in view of the history of the family, as set forth in the Statement of Facts, they did not intend by that document to produce another debtor and creditor relationship with more foreclosure sales, at least not in the immediate future. These two pieces of property had just gone through two judicial sales with no buyers.

There were two possible views that might be taken by the Court as to the remedy accruing to plaintiffs out of the relationship established by Exhibit 7: (a) Trusteeship arising out of agency; or (b) an option by the heirs

to acquire their proportionate share of the title at some time in the future after demand. The fact that no one knew of the existence of Exhibit 7, or, if they ever knew of its existence, had forgotten it during the lapse of forty-two years, and the further fact that Alma Smith had advised defendant that the document had never been signed by plaintiffs, actuated the conduct of the parties in their dealings with each other during that long period of time. One thing, however, was never changed: the primary objective of defendant was to provide a home for his mother and her family and this was accomplished by defendant. For forty-two years the family has lived in the home rent free, without even so much as payment of taxes, and the Court will note that in his claims for credit defendant has asked no accounting for rentals for occupancy, by the other members of the family, since he left the parental home in 1931.

After the discovery of Exhibit 7, plaintiffs still elected to claim and assert that the document created the relationship of trustee and *cestui que* trust, arising out of agency, and the Trial Court at the very inception of the trial accepted that theory and all evidence produced at the trial was directed to other issues relating to results of that relationship.

In their belated effort to change the case from one of equity to a statutory action in foreclosure, plaintiffs had apparently entirely forgotten some of the maxims of equity which are a necessary part of any proceeding to have a deed declared to be a mortgage; and also com-

pletely overlooked that there is a vast difference between the relationship of a trustee to the *cestui que* trust and that of a mortgagor to a mortgagee.

One of the first things we learn in law school is that trusts have to do with equity, and he who comes into equity seeking its aid must offer to do equity. A deed valid on its face is only changed in effect to a mortgage by a proceeding in equity, and one of the most important things you have to do in seeking the aid of equity is to offer to do equity; also, you must act promptly and you must be sure you are not barred by having slept too long on your rights.

In this connection appellants completely misunderstand the legal points involved in Point IV of their own brief. They assume that by some sort of legerdemain the relationship between appellants and respondent is that of mortgagor and mortgagee. They further assume that respondent has only a lien on the disputed lands, and then based upon that faulty assumption, argue that the only procedure available to respondent is to foreclose this imaginary mortgage. It is true that Exhibit 7 says that defendant is to have a lien for his advancements, but that does not necessarily say that the relationship of defendant to plaintiffs is changed from that of trustee to that of mortgagee. Every agent who advances funds for his principal has a lien on the property of the principal in his possession for repayment of the funds advanced, but is an equitable lien arising out of his fiduciary relationship and his right is to retain the property until the

principal reimburses him or until the principal loses his right through laches or some other method instituted by the agent himself. This is recognized basic law. See Restatement of the Law under "Agency," Sec. 14-B, and Sec. 464. It is also announced in 2 Am. Jur. 244, Sec. 313 under "Agency." Agency is a fiduciary relationship, and is one of the confidential relationships protected by the maxims of equity. The mortgagor and mortgagee relationship is not fiduciary and operates only under the statutes and the common law.

In 1922 all of the parties to this action were strangers to the title. The tracts were then vested in third parties. Plaintiffs could not grant unto respondent a lien upon lands which they did not own, nor was respondent under any legal obligation to undertake to pay off the old family debts nor to repurchase the property. He could have purchased the property from Dayton and the Association of Credit Men without any authorization from plaintiffs. He did not absolutely undertake to do anything. He was merely authorized to do so, if such he desired to do. Appellants could not grant and did not grant a lien to respondent beyond that which the law of agency already gave him. Exhibit 7 authorizes defendant, so far as plaintiffs are concerned, to acquire title from the strangers who then owned it. The first time plaintiffs acquired a right to anything was after defendant had taken title. The Trial Court has held that in so doing he acquired the title in trust and that if, as and when plaintiffs tender a full reimbursement to defendant for the amount expended, with interest, they will

be entitled to eight-ninths (8/9) of the legal title. They will then become joint owners with defendant, which is the relationship intended to be established by Ex. 7.

Respondent has never had any need to institute a foreclosure action. He is already the record owner of the unencumbered legal title which he has held since 1922, subject only to the right of plaintiffs to buy in if they desire to do so. The next move is up to appellants. Absent such a move on their part within the time limited by laches, defendant remains the owner of the title. Plaintiffs can only come into a Court of Equity after an offer to do equity and they can expect equitable relief only upon that basis.

In the case of *Bybee v. Stuart*, (112 Ut. 462, 189 P. 2nd 118) cited by appellants, it will be noted that in that case plaintiffs tendered to defendant the full amount owed to defendant and then demanded a deed, and upon appeal this Court stated that plaintiffs were entitled to recover because the transaction was in the nature of an equitable mortgage and they were entitled to be regarded as legal owners because they were willing to pay the debt. That is exactly what the Trial Court has held in this case, and it did so upon the basis of the claim of plaintiffs that a trust had resulted from the fiduciary relationship of agency created by Exhibit 7. The difference is, of course, that in this case plaintiffs do not want to do any paying before obtaining their interest in the land.

The following authorities sustain the action of the Trial Court in its determination of this question:

Colahan v. Smyth (Ore.) 81 Pac. 2d 112

Herrmann v. Churchill (Ore.) 385 P. 2d 190

36 Am. Jur. 790, Sec. 196 under Mortgages

33 Am. Jur. 441, Sec. 45 under Liens

If the Court had changed the case into a mortgage foreclosure, plaintiffs would have had the difficulty of overcoming the seven-year Statute of Limitations contained in Sec. 78-12-16, U.C.A. This would have been more devastating even than the doctrine of laches which is elsewhere presented, and they would not then have had the right to offer to do equity which the Trial Court gave them in this case. They could not have then avoided the full force of that Statute of Limitations by showing that they were holding the property under adverse possession as defined by Sec. 78-12-12, U.C.A. 1953, because they never at any time paid or offered to pay any taxes. The Trial Court went all the way in an effort to give plaintiffs the utmost in the way of rights that could possibly be established.

POINT V.

THE COURT PROPERLY HELD THAT THE
RIGHT TO REIMBURSEMENT WAS NOT
BARRED BY THE STATUTE OF LIMITA-
TIONS.

The argument of plaintiffs under this point is unique in the annals of jurisprudence. As we understand it, the crux of the argument amounts to this: the rights of plaintiffs to acquire an interest in the title under Exhibit 7 are not barred by laches or the Statute of Limitations,

but that the right of defendant to be reimbursed for his expenditures has been lost by reason of the Statute of Limitations, because, as they say, "J.B." saw fit to carry the costs with him into the partnership and thence into the corporation. That is typical of the whole attitude of plaintiffs toward this transaction.

For forty-three (43) years they have had a free ride on this matter. Since 1931 when defendant and his wife moved out of the parental home, no one has testified to a single benefit of any kind that he has had from his efforts to save the property and provide a home for his mother and her family.

On the other hand, with the exception of R. E. Walker, who moved out after his marriage in 1924, and occasional short periods of absence for some of the female plaintiffs, they and their families have lived there rent free for forty-three (43) years. The only reward that defendant has had is the privilege of getting out and raising the money to repurchase the property; and the privilege of paying or causing to be paid the taxes, insurance, water assessments and the cost of re-roofing the house and fighting the problems incident to protecting the water rights. One of the plaintiffs even refused to stipulate with the rest of the family that the \$800.00 still remaining in the hands of Alma Smith might be paid over to their mother before she died.

On this point, defendant submits that plaintiffs have certainly placed themselves beyond the pale for any considerations by a Chancellor in Equity.

CROSS - APPEAL

POINT I

THE TRIAL COURT SHOULD HAVE FOUND AS A MATTER OF LAW THAT PLAINTIFFS WERE GUILTY OF LACHES BY FAILING FOR FORTY YEARS TO ASSERT THEIR RIGHTS, IF ANY THEY CLAIMED.

If this Court sustains the Trial Court in its decision that the rights of plaintiffs were not lost through laches and by operation of the Statute of Limitations, such decision will probably stand as a new landmark as to the length of time that parties may, with impunity, sleep on their rights before asserting or attempting to assert them. To be exact, it is forty (40) years and seven (7) days between October 9, 1922, when Exhibit 7 was executed, and October 16, 1962, when the Complaint in this action was filed. Up to this time the longest period of record seems to be twenty (20) years, which was established in the case of *Petterson v. Ogden City*, 111 Ut. 125, 176 P. 2d 599. In that case Ogden City was excused from asserting its lien because of the fact that the statute relating to special improvements gave the City no independent right of enforcement. The clear import of the decision is that if the City had had a right of enforcement under the statute, it would have been barred by laches. There never was a time after 1922 when these plaintiffs could not have asserted their rights, if they felt they had any, by tendering their share of the money with interest and costs, and demanding eight-ninths (8/9) of the title.

We will not burden this Court with a lengthy discussion of the doctrine of laches. It is basic and was well set forth by this Court in the case of *Ruthrauff v. Silver King Western Mining and Milling Company*, 95 Ut. 279, 80 P. 2d 338. There is also a general discussion in 19 Am. Jur., Sec. 489, under Equity. While lapse of time generally may not be a bar, it is always a bar whenever the lapse of time is accompanied by a change of condition to the detriment of the defendant or to the advantage of plaintiffs. The case of *Duncan v. Colorado Inv. and Realty Co.*, (Colo.) 178 P. 2d 428, seems most apropos. Chief Justice Burke, speaking for a unanimous Court, spoke as follows:

“What is reasonable time within which to assert rights depends upon ‘the circumstances of each particular case * * * The time in which the courts have treated demands as stale varies from four to twenty years.’ (Sears v. Hicklin, 13 Colo. 143, 154, 21 P. 1022, 1025) * * *

“In the decades which have passed since that declaration we have found no case raising that maximum and are loath to do so now with no better excuse for the delay than here appears.

“The defense is particularly applicable in cases of notable increase, or probable increase, in value, where the former owner has evaded all risk and responsibility until time has brought to fruition the faith of his adversary.”

The case of *Hamud v. Hawthorne*, 338 P. 2d 387, decided by the Supreme Court of California in 1959 denied a similar right to have a deed declared to be a mortgage after five years where there had been such a change of

values as to be prejudicial to the one who was holding the legal title and would have still been left with it if values had not changed for the better. The law discussed as applied by the California Supreme Court is bad medicine for those who want to do nothing and then speak only if fortune favors them to do so.

In this case the plaintiffs failed to assert their rights during the depression when defendant had to get out and scrounge to get the money to pay taxes. They never lifted their voices until approximately 1955, when it apparently became profitable for them to do so. In the meantime, the one witness to this entire transaction, their mother, who knew all of the facts and who could have spoken as to where equity lay on the so-called accounting matters, was stilled in death. The entire attack by plaintiffs in this case was grounded in an attempt to have a belated accounting of family affairs back to 1912. This is the basis of their entire first point; namely, that an accounting would have shown that "J. B." was in fact in 1922 indebted to his mother. Their next attack was that an accounting of transactions between J. B. and R. E. between 1922 and 1933, when they were partners, would show that J. B. was indebted to R. E., and their final attack was an attempt to have another accounting of corporate affairs between 1933 and 1959. At the end of each of those periods there had been a settlement between the parties. Assuming that there should have been more complete corporate records, beyond the CPA investigation that Mr. Cope made as a basis for the settlement between R. E. and J. B. in 1959, it was certainly prejudicial,

unfair and extremely inequitable for plaintiffs to try to go back and demand accounting of intimate family affairs commencing fifty-two (52) years ago. One look at the evidence presented by plaintiffs in this case was as to where hay was bought, where grain was bought, how much the mother charged for board, whether employees were charged board, how much an old farm horse was worth, what became of the team that was used on the the farm; those and many other kindred things were the ones that these parties were trying to produce as the basis for their accounting. The Trial Court, with great liberality, permitted them to do so and then believed, as is so well stated in his opinion, that the saviour of the home, the breadwinner and the benefactor of this whole family transaction was the defendant, J. B. Walker. Certainly in the light of the many changing events that have come and gone since 1912 and 1922, equity should have stepped in and dismissed the case at the inception for failure to assert such rights as they claimed many, many years ago. In this connection the Court will note that at the request of Mrs. Minetta Walker, Alma Smith wrote to J. B. Walker (Ex. P-15) on November 10, 1949, asking him how much money he had had to advance on the Dayton mortgage. On July 16, 1952 (Ex. P-14) Mr. Walker gave the amount to Mr. Smith but even that modest effort produced no interest in putting up any money on the part of anyone. And so the matter rested for another twelve (12) years until this suit was filed.

POINT II

THE TRIAL COURT SHOULD HAVE ALLOWED DEFENDANT CREDIT FOR ALL MONEYS EXPENDED FOR TAXES AND OTHER PURPOSES ON PARCELS "A" AND "B."

Defendant was permitted to produce evidence by Exhibits D-20, D-21, D-23, D-40 to D-45, inclusive, as to the amount that had been expended on account of taxes and for other purposes on these various tracts between 1922 and the date of trial. However, the Court then, in its decision commencing at Page 412 of the Record, stated that he would refuse to allow defendant anything for taxes. He did so primarily upon the basis that the payment of tax were not contemplated by the agreement. He also stated that since the parties were living in the place as a home, whoever paid the taxes was getting value out of it and that he would assess no credit in favor of J. B. for taxes that were paid. He did allow some small amounts for moneys paid for attorney's fees to Henry D. Moyle and for placing a roof on the home; otherwise, all such moneys paid out by defendant or by the corporation or by A. L. Walker under agreement with J. B. on account of taxes or otherwise were disallowed.

It is undisputed in the evidence that none of these plaintiffs ever paid any taxes, excepting possibly one year when Ila may have paid them. They lived in and occupied the place but never paid any taxes. It is likewise undisputed that J. B. and his wife left the parental home in 1931, and there is not a word of evidence that he

ever received any benefits whatsoever from the place after 1931. As a trustee, in accordance with the Court's determination, it was his duty to pay the taxes or to see that they were paid. As owner of the legal title, he had, under the statute, the right to possess and occupy the tracts, and the right to the rents, issues and profits of the place. It was entirely his own private arrangement with the partnership, corporation, and later with A. L. Walker by which the taxes for a portion of the time were paid by them. It is difficult to see how, under any circumstances, these plaintiffs would be entitled to the benefit of that arrangement and be permitted to use and occupy the home and not be chargeable with the payment of rental or taxes at least to the extent of reimbursing J. B. for all taxes that he paid personally and all taxes that were paid by either the partnership or the corporation. He acquired all of the rights of both the partnership and the corporation when he acquired the entire stock interest of R. E. Walker at the time of settlement in 1959, subject only to any rights that R. E. might have as an heir, as elsewhere stated.

The Trial Court clearly erred in refusing to give the defendant a right to reimbursement for those items.

POINT III

THE TRIAL COURT SHOULD HAVE ALLOWED DEFENDANT CREDIT FOR FUNDS PAID OUT FOR THE PROTECTION OF OTHER TRACTS INVOLVED IN THE LITIGATION.

At the time of pre-trial conference, the issues were defined and the claim of plaintiff was expressly stated in the following language:

“With reference to any properties which are not specifically described in that agreement (Ex. 7), it is the contention of plaintiffs that defendant J. B. Walker acquired those properties on the same trust, to use and manage them for the benefit of the members of the family and particularly for his mother until her death.”

Defendant J. B. Walker presented and offered to present evidence of the fact that he had personally paid mortgages, and redeemed from sale, and paid taxes on the property standing in the name of his mother during the time that she owned it and before it was conveyed to A. L. Walker. Legal title to that tract was in the name of the mother at the time Exhibit 7 was entered into, and it was a part of the family problem, as it was a part of the farm. It was known as the “creek” property and was used primarily for raising crops. This particular piece of ground is the subject of litigation in the other action pending by plaintiffs against Austin Walker, and which action was joined with this case for consideration of issues at the time of pre-trial conference (R. 59-66).

Under the issues as framed, the Trial Court was clearly in error (R. 417) in denying the right of defendant J. B. Walker to reimbursement for moneys advanced by him for the liquidation of mortgages and payment of taxes on that tract.

CONCLUSION

The Trial Court should have dismissed the action on the basis of laches and failure to offer to do equity on the part of plaintiffs. Having refused to do so, the Court should have also allowed defendant full credit for all expenditures made by him or on his behalf, for taxes and otherwise, in the protection and safeguarding of the Dayton and Union Merc. tracts; also for moneys expended by defendant in the management and safeguarding of the tract standing in the name of Minetta Walker, the mother.

Respectfully submitted,

H. ARNOLD RICH and
MAX K. MANGUM

*Attorneys for Defendant
and Respondent,
J. B. Walker*