

1965

Walker Bank and Trust Company, Administrator of the Estates of Minnetta Walker, aka Netta Walker, Deceased, and Ila Minnetta Walker, Deceased, and John A. Walker, Deceased, and E. Walker, Roma Walker Grock and Alta Fay Walker Lake and J.B. Walker v. Austin Walker : Brief of Appellant

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IN THE SUPREME COURT OF THE STATE OF UTAH

WALKER BANK AND TRUST
COMPANY, a corporation, Admin-
istrator of the Estates of MIN-
NETTA WALKER, aka Nettie
Walker, deceased, and ILA MIN-
NETTA WALKER, deceased,
JOHN A. WALKER, deceased,
and R. E. WALKER, ROMA
WALKER GROCK and ALTA
FAY WALKER LAKE,

Plaintiffs and Respondents,

and

J. B. WALKER,

Involuntary Plaintiff,

—vs.—

AUSTIN WALKER,

Defendant and Appellant.

FILED

AUG 10 1965

Supreme Court, Utah

Case No.
10374

BRIEF OF APPELLANT

Appeal from a Judgment of the
District Court of Salt Lake County

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Plaintiffs and Respondents,

and

J. B. WALKER,

Involuntary Plaintiff,

—vs.—

AUSTIN WALKER,

Defendant and Appellant.

Case No.
10374

BRIEF OF APPELLANT

STATEMENT OF THE CASE

This is an action by Walker Bank and Trust Com-
pany as Administrator of the Estates of Minnetta Walker
and Ila Minnetta Walker and others against Austin
Walker, Appellant herein, seeking to have certain con-
veyances of real property made to Appellant by Min-

netta Walker (Mother of Appellant) and Ila Minnetta Walker (Sister of Appellant) set aside and requesting the Court to vest the legal titles therein in Plaintiffs as their interests may appear. Appellant asserted that as to the property deeded to him from his mother he was the owner thereof but that in the alternative if the Court adjudged Appellant was not the owner he was entitled to a lien thereon for his services and costs expended in connection with the property and his mother over the years. As to the property deeded from his sister Appellant claimed that he had received the property in trust for certain specific purposes which had been fulfilled.

DISPOSITION IN THE LOWER COURT

The matter was tried to the Court without a jury, following which the Court entered judgment divesting Appellant of title to any of the property transferred to him by his mother or sister and requiring him to account for and turn over to Walker Bank & Trust Company all such property, real or personal, as he may have received from his sister, including any interest dividends or other returns thereon, provided Appellant should have a lien on any property received from his sister for expenditures made by him for which the Court shall determine he is entitled to reimbursement.

RELIEF SOUGHT ON APPEAL

This being an equitable proceeding, Appellant seeks by this Appeal to have the Supreme Court review the evidence and determine that the trial court erred in

holding that a confidential relationship existed between Appellant and his mother and that Appellant exercised undue influence upon his mother in connection with the execution and delivery by her of the Deeds on the property in question. Appellant further contends that the trial court erred in refusing to allow Appellant or his wife to testify with respect to any claimed undue influence. In the alternative Appellant claims that he should be entitled to be reimbursed for the monies expended by him, for taxes and other costs incident to operation of the property and for his services rendered thereon and for his mother, for which he is entitled to a lien on the property.

With respect to the property acquired from his sister the Lower Court erred in holding there was a confidential relationship between the parties since Appellant has always conceded that he received such property in trust for certain purposes which are undisputed by the parties and in connection therewith the Court should have permitted him to make an accounting in which he would receive credit for his costs and expenses incurred as well as reasonable compensation for his services.

Finally, Appellant contends that the trial court erred in refusing to grant Appellant a new trial on the ground of newly discovered evidence.

STATEMENT OF FACTS

At the time of the pretrial this case and a companion case in which the plaintiffs are the same as here

and J. B. Walker is named as defendant, being case no. 139,265 recently decided on appeal by this court, were consolidated for trial (R. 15(a)). Even though consolidated, the evidence was heard separately in each case. The J. B. Walker case was tried first; and thereafter at the trial of the instant matter and evidence in that case insofar as applicable was deemed evidence in this case. References to the transcript in the J. B. Walker case will be by page number following the designation "JBW." Reference to the transcript in this case will be by page number following the designation "R."

Plaintiffs seek to have the court set aside two deeds obtained by the defendant from his mother upon the ground of incompetency of the grantor (Tr. 16a). They also seek relief with respect to transfers to defendant of property from his sister Ila.

The defendant Austin Walker is the youngest son of John A. and Minnetta Walker. He has two brothers, J. B. Walker and R. E. Walker, who are the two eldest children of the family. There were three sisters, Faye, Ila and Roma (JBW 210, 211). The father died in 1912 (JBW 211); Ila died on February 23, 1955 (R. 114); the mother died in November 1959 (R. 115). The family grew up on a farm of approximately 40 acres in the vicinity of Union in Salt Lake County, Utah (JBW 212). J.B., R. E., and Faye were married in the 1920s. R. E. moved away when he got married; J. B. and his wife remained in the home until 1931 when they moved away (JBW 211, 212). Faye and her husband moved to Nevada; Ila never married. She lived in the family home

all of her life until 1952 (R. 145). Roma lived in the family home except for periods when she worked in California and Nevada. She returned to the family home in 1954 and has been there ever since. (R. 249). Minnetta Walker, the mother, lived in the family home until her death, except for a year in 1952 and 1953 when she was with Faye in Nevada (R. 352). Austin married in 1933 (R. 142) and ever since then, except for two or three years, has lived with his family within approximately a block of the family home (R. 450).

Prior to 1920, J. B. and R. E. engaged in the trucking business and from then on did no farming (R. 143). From approximately 1920 until the present time Austin had practically the sole responsibility for the operation of the farm (R. 142). There were two or three years when his mother rented the farm but the lessees failed to perform and it became Austin's responsibility to salvage as much of the crop as possible (R. 289).

Until approximately 1947 there were horses and cows on the farm and chickens at various times (R. 418). Most of the crops produced on the place were used to feed the livestock and were used by the family (R. 288). Prior to about 1920, the family operated a mercantile store. However the store was closed in the early 1920s (JBW 239) and thereafter the only source of income of Mother Walker was from the sale of dairy and poultry products (R. 230) produced on the farm.

The farm consisted of three tracts of land — viz., a tract of approximately 11 acres shown in pink on Ex-

hibit 3; a tract shown in orange on Exhibit 3 consisting of approximately 19 acres; and a tract known as the "creek property" but not shown on Exhibit 3, consisting of approximately 10 acres. In addition there are the lots shown on Exhibit 3 East of the pink tract where the Walker home, outbuildings and store were located.

On October 8, 1954, Minnetta Walker, the mother, executed and delivered to Austin two deeds which are Exhibits P-4 and P-6. Exhibit P-4 describes the property known as the "creek property"; Exhibit P-6 describes the property shown in pink. These deeds were executed by Austin's mother at a bank in Midvale, Utah, in the presence of Dale Waters, Vice President and Manager of the bank, who then and there notarized her signature (R. 317, 318). At the time of the execution of said deeds she remarked, in his presence, that she was glad she could do this in return for what Austin had done for her and that Austin had more than paid for the property (R. 400, 406). From the time of their execution until they were recorded on November 25, 1959, said deeds were in the possession and control of Austin (R. 398).

In the late 1930s a compromise for delinquent taxes on the Walker property for several prior years was effected for the sum of \$844.44 (JBW 300). Austin paid this sum by his check dated December 26, 1939, Exhibit 49, in Case 139,265 (R. 407, 408). Austin also paid taxes on the Walker property for the years 1925, 1926, 1929 and 1931, totalling \$438.12. Exhibit D-11. Austin also paid taxes on the Walker property for the years 1943 to 1962 inclusive totalling \$3,320.07, Exhibit D-12. All

taxes above mentioned were paid with funds of Austin except during the 1930s Austin's mother gave him money to pay taxes for three or four years (R. 444). Taxes on the tract shown in pink and the "creek property" which were conveyed to Austin by his mother are included in the amounts paid for the years above set forth (R. 407). Austin had exclusive possession of the property acquired from his mother from the year 1947 until the present time. (R. 421).

In December 1954, Ila Walker, a sister of Austin, was in a hospital at which time she caused her property to be transferred to Austin (R. 321). Included in the property so transferred was a 3 acre tract, shown on Exhibit 3 as the property in brown, which was transferred by quit claim deed, being Exhibit P-5. Appellant has always agreed that he received the property from Ila for the purpose of paying her debts and funeral expenses and for paying for the support and maintenance of his mother until her death and then for her expenses of last illness and funeral expenses (R. 427). He offered at the time of the trial to account for the property received from Ila; but the court refused to permit him to do so (R. 427).

The trial court found there was a confidential relationship between defendant and his mother and also between defendant and his sister Ila (R. 47, 48). The trial court held the deeds from defendant's mother to be null and void on the ground of undue influence exercised by the defendant upon her (R. 47). The court ordered defendant to account for all the property transferred to

him from his sister Ila and, except such as the court "shall determine he is entitled to by way of reimbursement out of the assets of the trust," ordered him to deliver the same to the administrator of the estate of his sister (R. 44).

The defendant claims the deeds from his mother are valid or, in the alternative if he is deprived of the property, that he should be entitled to a lien thereon for the amount of taxes paid, improvements made and services rendered (R. 6, 7). Defendant acknowledged the trust with respect to the Ila property and offered to account for the same as stated above, and claimed compensation for his services as trustee (R. 19). Appeal is taken from the orders of the trial court denying defendant any of the relief claimed.

ARGUMENT

POINT I

THERE WAS NO CONFIDENTIAL RELATIONSHIP BETWEEN DEFENDANT AND HIS MOTHER; AND THE DEEDS WERE NOT PROCURED BY UNDUE INFLUENCE UPON HER.

The Court made a finding that a confidential relationship existed between Appellant and his mother and that the Deeds were procured by Appellant by the exercise of undue influence upon her but did not find any facts upon which the confidential relationship would rest. However, undue influence was not an issue in the case. The Pre-trial Order lists the contentions of the Respondents as follows:

(1) Defendant acquired certain property from his sister on an express trust (R-16). (This was always the position taken by Defendant.)

(2) If the property was not taken on an express trust, the transfer to Defendant from his sister was voidable because of "the incompetency of Ila Walker at the time of the execution of the instruments by which the various transfers were effected." (R-16A)

(3) The transfers of certain properties to Defendant from his mother "are void by reason of the incompetency of the grantor." (R-16A)

(4) Defendant has admitted and declared he "held those properties acquired from his mother in trust for the Plaintiffs and generally for the heirs of Minnetta Walker." (R-16A)

Nor did the Pre-trial Order frame an issue as to any "confidential" relationship between Appellant and his mother or sister.

At the beginning of the trial, Counsel for Respondents in his opening statement made the following reference concerning undue influence and confidential relationship:

"It will further be our contention that if Minnetta Walker was technically competent at the time she executed these instruments, she nevertheless did so under undue influence from the defendant, Austin Walker. Our evidence of undue influence will be simply the close family tie between the defendant and the donor, the fact that he lived in such close proximity to her, that he saw her quite frequently. His chicken coop was right next to her house. I say he saw her

frequently; and if there was a confidential relationship between this mother and any of her sons, it was between Minnetta and the defendant."

This statement explains why the record appears to be totally lacking in either any evidence of a confidential relationship between Defendant his mother or of any facts indicating the exercise of undue influence upon her by Defendant.

Although Respondents admitted at the outset that their claim of undue influence rests upon the "close family tie between the defendant and the donor," the law is well settled that family relationship alone is not sufficient to establish "confidential relationship" or "undue influence." In *Hatch v. Hatch*, 46 U.218, 148 P. 433, where the Court was concerned with a conveyance from a father to his son, the Court held:

"In nearly all, if not all, of the foregoing cases (excepting those cited from Utah) the question of what constitutes a fiduciary relation or one of such trust and confidence as ordinarily will cast the burden of proof on the beneficiary of a particular transaction is fully discussed. It is made very clear that under circumstances like those in the case at bar there is no such fiduciary relation of trust and confidence as will cast the burden of proof upon the beneficiary under a deed or a will. *The relation of parent and child or husband and wife does not, in and of itself, create any such presumption.*" (Emphasis added)

Again, in the case of *Froyd v. Barnhurst*, 83 U. 271, 28 P. 2d. 135, the Court made the following comments.

"Appellants apparently place the burden of their argument upon the proposition that there

was a confidential relationship existing between defendant and her mother, Mrs. Sandin, and therefore this case is controlled by the rule that, where such confidential relationship exists between grantor and grantee, the burden is upon the grantee to show the transaction to be fair and free from fraud and undue influence. Appellant cites *Peterson v. Budge*, 35 Utah 596, 102 P. 211; *Birdsell v. Leavitt*, 32 Utah 136, 89 P. 397; *Toland v. Corey*, 6 Utah 392, 24 P. 190; *Omega Investment Co. v. Woolley*, 72 Utah 474, 271 P. 797; also *Paddock v. Pulsifer*, 43 Kan. 718, 23 P. 1049, 1051.

"Defendants do not complain of the rule stated and followed in these cases, but contend they have no application to the case at bar. *In other words*, they contend the facts here do not present a case of fiduciary or confidential relationship. Here the claim of fiduciary relationship is based upon the following evidence in addition to the fact of the parties being mother and daughter: The mother was old and feeble, could not read or write the English language; she lived with the daughter, who at one time tried to collect a note belonging to her mother without success. For a time they had the mother's money in a joint bank account in the name of both the mother and daughter, and the daughter at times collected the rent due to her mother.

"*This court is committed to the doctrine that the mere relationship of parent and child does not constitute evidence of such confidential relationship as to create a presumption of fraud or undue influence. Hatch v. Hatch*, 46 Utah 218, 148 P. 433, 437; *Furlong v. Tilley*, 51 Utah 617, 172 P. 676." (Emphasis added)

See, also, *Furlong v. Tilley*, 51 U. 617, 172 P. 676; *Amado v. Aguirre*, 63 Ariz. 213, 161 P. 2d. 117; *Salvner v. Salv-*

ner, 349 Mich. 375, 84 N.W. 2d 871, *Binder v. Binder*, 50 U. 2d 142, 309 P. 2d 1050.

This Court has been required on several occasions to reverse the trial court on the matter of undue influence. See, *Chadd v. Moser*, 25 U. 369, 71 P. 870; *Stringfellow v. Hanson*, 25 U. 480, 71 P. 1052; *In re Lavelle's Estate*, 122 U. 253, 248 P. 2d 372; *Richmond v. Ballard*, 7 U. 2d 341, 325 P. 2d 839.

In the Richmond Case this Court quoted with approval from the earlier case of *Anderson v. Thomas*, 108 U. 252, 159 P. 2d 142. There the evidence relied on by the Plaintiff to set aside the conveyance included the following facts:

"(1) The transfer to the Defendant son was without consideration (other than love and affection);

(2) The Grantor (mother) was 86 years old;

(3) She was failing in health and almost totally blind;

(4) At time of the transfer she was grieving over the loss of another son;

(5) Court found that, under the circumstances, the Grantor could have been easily imposed upon;

(6) The Grantee (son) lived in same home with the Grantor;

(7) The Grantee received "substantially all" of Grantor's property a few months before Grantor's death;

(8) The transfer to Grantee in effect disinherited six other children;

"This Court, in an opinion by Justice Wolfe, affirmed the District Court's decision refusing to find undue influence on the above facts, stating:

'However, these circumstances alone are not sufficient to show undue influence. The Plaintiff must do more than merely raise a suspicion. There must be some affirmative evidence to show that Richard did exercise a dominating influence over this mother and thus induced her to part with her property. Such affirmative evidence is almost totally lacking here.'

"The Court observed that 'no one testified to anything that would indicate that Richard was bringing pressure to bear on his mother to effect the transfer of this property to him.' "

A finding of undue influence cannot rest upon mere suspicion, nor will it be presumed from mere interest or opportunity.

"We are aware that '***undue influence is seldom subject to direct proof, but, as a general rule, must be established by inferences and circumstances***'; but it must also be kept in mind that ****it likewise is true that a finding of undue influence cannot rest upon mere suspicion.* There must be some substantial facts upon which the inferences and deductions are based, and the circumstances relied on should clearly point out the person who it is alleged exercised the undue influence and his acts constituting the alleged undue influence." (Emphasis added.) In *re La-Velle's Estate*, 122 Utah 253, 248 P. 2d 372, 378.

***Undue influence must be proved. *It will not be presumed from mere interest or opportunity. The opportunity to exercise influence, unless combined with circumstances tending to show its exercise affords no presumption that it was in*

fact exercised." (Emphasis added.) Re Bryan's Estate 82 Utah 390, 25 P. 2d 610.

Bradbury v. Rasmussen,U. 2nd...., 401 P. 2d 710, is the most recent case of which we are aware in which this Court has discussed confidential relationship and undue influence. In that case the Court reversed the trial court and found there was not a confidential relationship and that a finding of undue influence could not be sustained. In discussing these questions, the Court stated on page 713 of 401 Pacific 2nd:

"The first question to be resolved is whether the lower court erred in its determination that a confidential relationship existed between the parties as that term is considered in its legal significance. *The evidence is undisputed that there existed among the parties sincere affection, trust and confidence, but is that legally sufficient to constitute a confidential relationship giving rise to a presumption that the transaction was unfair?* We think not.

"The mere relationship of parent and child does not constitute evidence of such confidential relationship as to create a presumption of fraud or undue influence. While kinship may be a factor in determining the existence of a legally significant confidential relationship, there must be a showing in addition to the kinship, a reposal of confidence by one party and the resulting superiority and influence on the other party. *The relationship must be such as would lead an ordinarily prudent person in the management of his business affairs to repose that degree of confidence in the other party which largely results in the substitution of the will of the latter for that of the former in the material matters involved in the transaction.* The doctrine of con-

fidential relationship rests upon the principle of inequality between the parties, and implies a position of superiority occupied by one of the parties over the other. *Mere confidence in one person by another is not sufficient alone to constitute such a relationship. The confidence must be reposed by one under such circumstances as to create a corresponding duty, either legal or moral, upon the part of the other to observe the confidence, and it must result in a situation where as a matter of fact there is superior influence on one side and dependence on the other.*" (emphasis ours)

The court, in *Bradbury vs. Rasmussen*, supra, also held that undue influence must be proved by clear and convincing evidence. The record in the instant case is lacking in proof of undue influence by clear and convincing evidence. Infact, it is wholly devoid of any evidence of undue influence. It is not even susceptible of a suspicion of undue influence. At most, Respondents have done no more than show an opportunity. This is not enough.

Although handicapped by the court's ruling on the application of the "dead man's statute," defendant's evidence is clear and positive and refutes even a suggestion of undue influence. The execution of the deeds by Mother Walker was not a "bedroom" transaction nor a "death bed" episode. The deeds were executed more than four years prior to her death in a bank in Midvale, Utah, before a vice president and manager of the bank and were notarized by him (R. 317). Although Mr. Waters, the bank officer, could not remember the conversation, he remembered the incident and testified there was noth-

ing unusual about the transaction that attracted his attention (R. 318). Had defendant attempted to impose his will upon his mother to such an extent as to result in the substitution of his will for hers, it is quite unlikely that such would have escaped the observation of Mr. Waters. Defendant testified that his mother stated in the presence of Mr. Waters that she was happy she could do this (execute the deeds) in return for what defendant had done for her (R. 400). She also stated at that time that defendant had more than paid for the property (R. 406).

Undue influence is refuted by the evidence of J. B. Walker. He testified that the mother told him that she was going to see that Austin got the property (R. 349) and that it was her intention that Austin have the property because of the care that he and his family had given (R. 351).

After the deeds had been made over to Austin, she told J. B. that she had done so (R. 355). If Austin had used undue influence to get the deeds, it is quite unlikely that Mother Walker would have told J. B. some nine years prior thereto of her intention to deed the property to him, and, after the deeds were made, advise J.B. that she had done so.

Mother Walker was able to resist the persuasion of others for she told J.B. that she had come home from Nevada in order to avoid the pressure which was put upon her by the folks in Nevada to deed her property to them (R. 353). This circumstance might be a clue to this case for it is a common trait of human nature for

a person to accuse another of the evil which he himself possesses. If plaintiffs attempted to persuade Mother Walker to convey her property to them, it is not surprising that they should accuse Austin of the same evil doings. If there is a suspicion of evil doing by Austin, it is in the minds of the plaintiffs and not in the evidence.

At the close of the evidence the trial court gave his impression thereof. Among other things he stated,

"I think truth hasn't been rampant around here. Let me put it that way first. I think there has been somebody's conscience seared a lot here, but it doesn't seem to faze them much, and so I have to pick what I think is the truth." (R. 480, 481)

"I believe J.B. has done a lot for this family." (R. 481)

"I think that Austin Walker was young enough to kind of get caught in the snare and stay home, and the fellow that stays home generally has the rough end of keeping things together." (R. 481)

"I think the testimony of a man who teaches school, who's been a bishop in his church, should be given a little more weight than the other witnesses have where his testimony is competent.. I would be inclined to think that maybe he may be telling me the truth here in places." (R. 481, 482).

"The testimony of J.B.'s wife, Mary or Marilyn — I have forgotten her name — something like that — and J.B. leads me to believe that Mother just wasn't being imposed on here insofar as that property is concerned, and I would think the property in pink ought to go to Austin as his own." (R. 482)

The later findings of confidential relationship and undue influence are obviously repugnant and contradictory to the Court's own evaluation of the evidence.

Although the Court made no finding as to the adequacy of consideration in the transfers from Minnetta Walker to her son, there can be no question that there is sufficient consideration by reason of Appellant's caring for the property and his services to his mother over the years.

In the case of *Randall v. Tracy Collins Trust Company*, 6 U. 2d 18, 305 P. 2d 480, the court was concerned with a situation where the Plaintiff left his business and home in Ogden and moved to Provo, Utah, which together with services rendered for the decedent was held to be adequate consideration for an agreement to convey real property.

In the case of *Gibbons v. Brimm*, 119 U. 621, 230 P. 2d 983, an action was brought to set aside a conveyance of property to the Defendant which was made in return for Defendant's promise to provide Plaintiff with a home, support and care upon the ground that Plaintiff was so infirm of body and mind "that her will was overcome to the extent that the execution and delivery of the documents were not her voluntary acts." The Defendant grantee in that case was a niece who had been the object of special affection from the Plaintiff. The Grantor was 75 years of age, in ill health, and desired to have the Defendant come to live with her, care for her and run the

farm. Comments of the Court are particularly pertinent to the facts in the instant matter, which we quote:

“The plaintiff apparently set out to make two main contentions in seeking to avoid the effects of the deed, bill of sale and assignment. (1) That she was so infirm of body and mind that her will was overcome to the extent that the execution and delivery of the documents were not her voluntary acts; and (2) that the defendants breached the agreement to provide her a home and care, which entitles her to rescission. The burden of proving these contentions was upon the plaintiff.”

Also:

“Without delineating them, we observe that the evidence reveals some discrepancies in plaintiff’s testimony concerning the ownership and disposition of personal property which may have given rise to some skepticism on the part of the trial court with respect to plaintiff’s frankness, or perhaps better stated, her lack of memory and understanding of details due to her infirmity and advanced age.

“The plaintiff made some effort in the evidence to support her first point that the execution of the conveyances were not voluntary. The sequence of events themselves, without more, would be sufficient refutation of this contention. But taken together with other evidence there is ample to warrant the court in refusing to believe that plaintiff had met her burden of proof that she did not intend the coveyances.”

See also: *Desert Centers, Inc. v. Glen Canyon Inc.*,
11 U. 2d 166, 356 P. 2d 286.

POINT II

THE COURT ERRED IN ITS RULING ON THE "DEAD MAN'S STATUTE" BY PRECLUDING DEFENDANT AND HIS WIFE FROM TESTIFYING WITH RESPECT TO MATTERS PERTAINING TO UNDUE INFLUENCE.

Under Point I it was urged that the evidence does not support the finding of undue influence. Although not admitting the sufficiency of the evidence, it is the contention of defendant that by offering evidence of undue influence plaintiffs waived the incompetency created by the "dead man's statute" with respect thereto. The rule adopted by this court is that "under 'dead man's statute' (Sec. 78-24-2 U.C.A. 1953) a witness whose interest is adverse to that of the estate of deceased may testify concerning matters equally within knowledge of deceased and witness, where representative has put in testimony as to those matters***." *Burk v. Peter* 115 Utah 58, 202 P. 2d 543, *Startin v. Madsen* 120 U. 631, 237 P. 2d 834.

Defendant offered to testify to conversations with his mother concerning her motive in making the deeds but was prevented from doing so by the ruling of the court on the "dead man's statute" (R. 404, 405, 406.) Defendant offered a schedule, Exhibit D-13, showing crops he had produced on the farm year by year for a period of over 20 years (R. 409). The court refused to admit the exhibit (R. 412). Defendant also offered to testify to improvements he had made on the farm over the years (R. 415) but was not permitted to do so by the

ruling of the court on the dead man's statute (R. 416). Motive of the mother in making the deeds, crops produced by defendant on property in question, and improvements made thereon by defendant, tend to refute undue influence. The court erred in failing to admit such evidence.

POINT III

THE TRIAL COURT ERRED IN FINDING A CONFIDENTIAL RELATIONSHIP EXISTED BETWEEN DEFENDANT AND HIS SISTER ILA AND IN DENYING COMPENSATION TO DEFENDANT FOR HIS SERVICES AS TRUSTEE.

The court found defendant had received property from his sister Ila upon an oral trust (R. 48) and ordered him to account therefor. (R. 43). The court also found there was a confidential relationship between defendant and his sister (R. 48).

For the same reasons as set forth in Point I, it is urged that the evidence does not support the finding of a confidential relationship between defendant and his sister Ila. Had defendant attempted to impose upon his sister or take advantage of her why should he admit he held the property in trust. Defendant acknowledged the trust in his answer (R. 8). His position was stated in the pretrial order (R. 17). Defendant claims to have used funds of his own to defray the expenses for which the property of his sister was to be used and that the expenses which he paid exceeded in value the property received from Ila (R. 9). Defendant has never claimed as his own the residue of the property, if any, after

the expenses were paid. It may be urged that defendant was in error in using his own funds for payment of expenses and attempting to offset such against the value of the Ila property. If it is proper that he should account for the Ila property and be reimbursed for moneys advanced from his own funds, the fact remains that he does not and never has claimed the residue, if any, as his property.

The facts, as above set forth, should refute the finding of confidential relationship. Even more significant than the lack of evidence to support the finding is the lack of necessity for the finding at all. Had defendant denied the trust plaintiffs would have been justified in attempting to prove confidential relationship. Admission of the trust by the defendant obviated any necessity for the finding of confidential relationship. Inasmuch as the finding of confidential relationship is unnecessary to support the trust it appears the only purpose therefor is an attempt to justify disallowance of compensation to defendant for his services in caring for the property of his sister. If an accounting shows disposition of the property in accordance with the trust, the claim of the defendant, as set forth in the pretrial order (R. 19) for the compensation for his services, as trustee, is well founded.

POINT IV

THE COURT ERRED IN DENYING DEFENDANT ALTERNATIVE RELIEF BY WAY OF A LIEN ON THE PROPERTY ACQUIRED FROM HIS MOTHER FOR IMPROVEMENTS AND TAXES PAID.

If the court determines that the deeds from defendant's mother were not obtained by undue influence, defendant's claim of a lien by way of alternative relief becomes moot. In any event, discussion here should not be construed by way of detraction from the firm conviction of defendant that the finding of undue influence should be reversed.

The maxim, "He who seeks equity must to equity" has long been recognized by this court. See *Commercial Bank v. Page and Brinton*, 45 Utah 14, 142 P. 709; *Hancock v. Luke*, 52 Utah 142, 173 P. 137; *Rosenthyne v. Matthew-McCullough*, 51 Utah 38, 168 P. 957; *Glenn v. Player*, 7 Utah 2d 428, 326 P. 2d 717.

Plaintiffs have been content to sit by and allow defendant to take care of the farm for over forty years, pay taxes thereon and improve the same and make the produce therefrom available for members of the family who were at home and, particularly, to provide for an income for the mother. But when the economic complexion of the property changed from a farm value of some \$200.00 per acre to a subdivision value of \$5,000.00 an acre, plaintiffs suddenly become interested and seek the equitable power of the court to deprive defendant of his title thereto. (J.B.W. 295-298)

The property was saved from tax sale by defendant. Detail as to the taxes paid by defendant is set forth in the Statement of Facts. Defendant farmed the property for some 40 years for the benefit of the family (R. 142, 288, 289 and 230). Plaintiffs will probably contend

that the farming operation was of economic benefit to defendant. This appears to be a fallacy in view of the fact that there were some years when Mother Walker rented the property on shares but the lessees apparently did not think it worthwhile to continue through the year so they walked away and left Austin to salvage such crop as he could for the benefit of the family. (R. 289). The fact is that defendant operated the farm for the benefit of the family.

If defendant is to be deprived of the property, the court should avoid unjust enrichment to plaintiffs and invoke the equitable maxim referred to above by charging the property with a lien in favor of defendant for taxes paid and services rendered by him.

POINT V

THE COURT ERRED IN DENYING DEFENDANT'S MOTION FOR NEW TRIAL.

Defendant filed a motion for new trial upon the grounds, among other things, of newly discovered evidence (R. 50). Affidavits of defendant, Glenn C. Schmidt and Ray Smith were filed in support thereof (R. 52-57). The affidavit of Ray Smith states that he had been acquainted with Minnetta Walker for some years prior to her death; that in approximately the year 1948 he had conversations with Minnetta Walker with respect to purchasing an acre of ground, at which time she stated she would sell an acre of ground to him but that she intended to convey the remainder of her property to her son, Austin Walker, for the purpose of compen-

sating him for services performed and improvements made on her property. In his affidavit Glenn C. Schmidt states that he is a real estate broker residing in Salt Lake County, Utah; that in approximately the years 1948 and 1949 he approached Minnetta Walker for the purpose of purchasing a building lot from her, at which time she advised him that she was negotiating with Ray Smith for the sale of an acre of ground and that she intended to keep the remainder of her property for the purpose of conveying the same to her son, Austin Walker, and that she wanted to reserve it for her son, Austin, to permit him to place a supermarket on the property if he so desired. The affidavit of Austin Walker states that since the trial of the cause he talked with Rex Cole on the telephone who advised defendant that in about the year 1950 he had had conversations with Minnetta Walker in which she had told him that she intended to give her property to her son Austin for the reason that he had made improvements thereon and had performed services for her and her family.

To warrant granting a new trial on newly discovered evidence this court, in the very recent case of *Universal Investment Co. v. Carpets, Incorporated*, Utah, 400 P. 2d 564, 567, has stated that the moving party must meet these requirements:

“there must be material, competent evidence which is in fact ‘newly discovered;’ which by due diligence could not have been discovered and produced at the trial; and it must not be merely cumulative or incidental, but it must be of sufficient substance that there is a reasonable likelihood that with it there would have been a different result.***”

In *Jensen v. Logan City*, 89 Utah 347, 57 P. 2d 708, this court held the trial court had abused its discretion in denying a motion for new trial based upon newly discovered evidence. The court stated on page 723:

“Where disinterested testimony on the vital point in a case is very scant, newly discovered testimony on that point appearing from affidavits in support of the motion for a new trial to be apparently reliable, when it appears that the movant for the new trial was not guilty of indiligence in failing to obtain the witness for the trial, and that there is no element of holding such witness in reserve for purposes of obtaining a new trial — generally picturesquely denominated in slang phraseology as ‘an ace in the hole’ — and it appears likely that such evidence would change the result, a new trial should be granted. While the granting or refusing of the motion lies in the sound discretion of the court, where there is grave suspicion that justice may have miscarried because of the lack of enlightenment on a vital point which new evidence will apparently supply, and the other elements attendant on obtaining a new trial on the ground of newly discovered evidence are present, it would be an abuse of sound discretion not to grant the same. ***”

The foregoing rule is also followed in *State v. Duncan*, 102 Utah 449, 132 P. 2d 124.

The case at bar meets the requirements set forth above.

A vital point in this case is the court's finding of undue influence. However, as hereinabove pointed out, undue influence was not framed as an issue in the pre-trial Order. Therefore, Appellant could not have an-

anticipated that it would later be the basis upon which the trial court would set aside the transfers. The fact that defendant's mother, several years before the conveyances were made, disclosed to three disinterested persons her intent to convey her property to her son, Austin, should have a material bearing upon the question of undue influence. Such evidence is of sufficient substance that with it there is a reasonable likelihood that the result would have been different.

The evidence was newly discovered. In his affidavit, defendant states that he had no knowledge of such evidence until after the trial. The evidence could not, by due diligence, have been discovered and produced at the trial since the matter was not an issue in the case. The affidavit of defendant in support of the motion states that he contacted Ray Smith in the summer of 1964 in preparation for the trial and was advised that Smith had negotiated with defendant's mother for the purchase of an acre of land, but defendant did not know until after the trial that his mother had stated to Smith that she wanted him, the defendant, to have her property. (R. 52). The affidavit of Ray Smith states that he did not inform defendant of such statement until January 1965. Defendant's affidavit states that he attempted to locate Rex Cole in the summer of 1964. He made inquiry of relatives of Rex Cole and attempted to correspond with him but was unable to locate him so that he might be a witness at the time of the trial (R. 53). Defendant had no knowledge prior to January 1965, after the trial, of the fact that Glenn Schmidt had negotiated with defendant's mother for purchase of land and that she had

told him that she intended to keep the property and give it to her son, Austin (R. 57).

The evidence is not merely cumulative but relates to a matter injected into the case at the trial without defendant having had an opportunity to prepare to meet such issue. Dale Waters, the bank officer, testified to the execution of the deeds but could not recall any of the conversation (R. 318). Defendant and J. B. Walker testified to statements made by their mother regarding the conveyance of the property to defendant. It is difficult to justify the court's finding in light of such evidence unless he considered the interest of the witnesses. If such is true, the testimony of three disinterested persons is not cumulative and is vital to the issue.

CONCLUSION

The principal object of this appeal is to obtain a reversal of the trial court's finding of undue influence. The record shows the defendant operated the family farm all of his adult life and lived in close proximity of his mother and had almost daily contact with her. If such circumstances provide opportunity for the exercise of undue influence, they fall far short of anything suggesting actual domination and exertion of influence.

In view of the deficiency in the evidence, as expressed in Point I, it is a deplorable thing, aside from the economic consequences involved, for the court to have branded a wholesome relationship of parent and child with the stigma of a confidential relationship as such is known in the law. This court is therefore strongly urged

to correct the error of the trial court and reverse the finding of undue influence. It is hoped that such will be accomplished by this appeal.

It has been emphasized in Point III that not only was there lack of evidence to sustain the finding of a confidential relationship between defendant and his sister but there was no necessity for such finding at all. This error should also be corrected. Defendant should be required to account for his sister's property and should be allowed compensation for his services in the handling thereof.

The record is such that the errors of the trial court should be corrected without the necessity of a new trial. If for any reason the court is not of such an opinion, it has been pointed out that ground for a new trial exists and such should be granted. It is hoped that relief can be afforded and justice done on behalf of defendant without the rewashing of the family linen for a period of some 40 years in a new trial. Finally, if all else fails, defendant should not be deprived of relief. Equity requires that its principles be invoked by impressing the property with a lien in favor of defendant as suggested in Point IV.

Respectfully submitted,
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