

1963

Vera T. Callister v. Lucy C. Callister : Brief of Appellant

Utah Supreme Court

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IN THE SUPREME COURT OF THE STATE OF UTAH

VERA T. CALLISTER,

Plaintiff and Respondent,

v.

LUCY C. CALLISTER, Individually
and as Executrix of the Estate of
Alfred Cyril Callister, Deceased,

Defendant and Appellant.

FILED
1963

Court, Utah

Case No.
10013

APPELLANT'S BRIEF

**Appeal From a Judgment of the Third District Court
For Salt Lake County
Honorable A. H. Ellett, Judge**

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TABLE OF CONTENTS

	Page
STATEMENT OF KIND OF CASE	1
DISPOSITION IN LOWER COURT	2
RELIEF SOUGHT ON APPEAL	2
STATEMENT OF FACTS	2
 ARGUMENT	
I. The record is devoid of any evidence of fraud on the part of defendant.	16
II. The fraud relied upon by plaintiff, if there was any, is insufficient in law to justify the trial court in setting aside a judgment, and the defendant is entitled to dismissal as a matter of law.	27
III. There was no fiduciary relationship between plaintiff and defendant which placed upon the de- fendant a duty to disclose to the plaintiff evidential facts affecting the outcome of the prior action.....	31
IV. A proceeding to set aside a judgment and release is an equitable action, and there were triable issues of fact upon which the plaintiff's right to relief was dependent.	42
V. The trial court erred in reinstating the previous action and should have required the plaintiff to initiate a new action against the estate of Alfred Cyril Callister, deceased.	45

	Page
CONCLUSION	46
Beless Letter	Appendix "A"
Lucy's Affidavit	Appendix "B"

AUTHORITIES CITED CASES

<i>Althoff v. St. Louis Transit Co.</i> , 204 Mo. 166, 102 S.W. 642	44
<i>In Re Blodgett's Estate</i> , 93 Utah 1, 70 P.2d 742..	37
<i>Borge v. Traaen</i> , 158 Ore. 454, 75 P.2d 939, 76 P.2d 1127	34
<i>Brown v. Hassenstab</i> , 212 Or. 246, 319 P.2d 929....	44
<i>Burch v. The Hibernia Bank et al.</i> , 146 Cal. App. 2d 422, 304 P.2d 212	29
<i>Colton v. Stanford</i> , 82 Cal. 351, 23 Pac. 16, 16 Am. St. Rep. 137	24
<i>Delgado v. Delgado</i> , 42 N.M. 582, 82 P.2d 909	45
<i>Emmons v. Barton</i> , 109 Cal. 662, 42 Pac. 303	34
<i>Farnsworth et al. v. Hatch</i> , 47 Utah 62, 151 Pac. 537	33
<i>Fehringer v. Commercial National Bank of Ogden</i> , 23 Utah 393, 64 Pac. 1108	33
<i>Ferrell v. Wiswell</i> , 45 Utah 202, 143 Pac. 582	42
<i>Free v. Farnsworth et al.</i> , 112 Utah 410, 188 Pac. 731	46
<i>Graham v. Atchison Topeka & Santa Fe R. Co.</i> , (9 Cir.) 176 F.2d 819	44

	Page
<i>Haner v. Haner</i> , 13 Utah 2d 299, 373 P.2d 577....	27
<i>Idaho Globe Dredging Corp. v. Boise Payette Lumber Co.</i> , 60 Idaho 127, 90 P.2d 688	45
<i>Jorgensen v. Jorgensen</i> , 32 Cal. 2d 13, 193 P.2d 728	39
<i>LeVine et al v. Whitehouse et al.</i> , 37 Utah 260, 109 Pac. 2	44
<i>In Re Madsen's Estate</i> , 123 Utah 327, 259 P.2d 595, 606	42
<i>Mills' Heirs v. Lee</i> , 22 Ky. 91, 17 Am. Dec. 118..	21
<i>Oberg v. Sanders</i> , 111 Utah 507, 184 P.2d 229.....	26
<i>Pace v. Parrish et al.</i> , 122 Utah 141, 247 P.2d 273..	26
<i>Pepper v. Litton</i> , 308 U.S. 295, 60 S. Ct. 238, 84 L. Ed. 281	26
<i>Pietro v. Pietro</i> , 147 Cal. App. 2d 788, 305 P.2d 916	30
<i>Sartor v. Arkansas National Gas Corp.</i> , 321 U.S. 620, 628 S. Ct, 724, 88 L.Ed. 967, 973.....	42
<i>Sonnentheil v. Christian Moerlein Brewing Co.</i> , 172 U.S. 401, 408, 43 L.Ed. 492, 495, 19 S. Ct. 233	43
<i>Taylor v. Bradshaw</i> , 22 Ky. 146, 17 Am. Dec. 132	21, 22
<i>Taylor v. Moore et al.</i> , 87 Utah 493, 51 P.2d 222	44
<i>Thompson v. Kansas City C. C. and St. J. Ry. Co.</i> , 224 Mo. App. 415, 27 S.W. 2d 58	26
<i>Union Pacific Railway Co. v. Whitney</i> , (8 Cir.) 198 Fed. 784	44
<i>Western Grain Company Cases</i> , 264 Ala. 145, 85 So. 2d 395	26

	Page
<i>Wright v. W. E. Callahan Construction Co. et al.</i> , 108 Utah 28, 156 P.2d 710	29

TEXTS AND TREATISES

64 A.L.R. 797	19
83 A.L.R. 1446	19
2 <i>Bancroft's Probate Practice</i> (2nd Edition) §474	32
2 <i>Bancroft's Probate Practice</i> (2nd Edition) §477	34
12 C.J.S. <i>Cancellation of Instruments</i> , §38, p. 999..	44
30 C.J.S. <i>Equity</i> , §93	45
31 C.J.S. <i>Estoppel</i> , §98	43
37 C.J.S. <i>Fraudulent Conveyances</i> , §422, p. 1267 et seq.	18
Utah Code Annotated 1953	
Title 25, Chapter 1	17
25-1-4	17
25-1-7	17
75-9-9	45, 46
75-11-13	33
75-11-14	33
78-24-8	19

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APPELLANT'S BRIEF

STATEMENT OF KIND OF CASE

This was an action to set aside a release, stipulation, and judgment (resulting from compromise and settlement of a prior action) and to recover, along with \$25,000.00 punitive damages, the full amount demanded in the prior action less \$4,000.00 paid to settle it. The complaint alleges that defendant's fraudulent representations had induced plaintiff to settle.

DISPOSITION IN LOWER COURT

Defendant moved to dismiss for failure to state a claim, and both parties moved for summary judgment. The court granted plaintiff's motion, holding as a matter of law that plaintiff was entitled to have the prior stipulation, judgment, and release set aside.

RELIEF SOUGHT ON APPEAL

Appellant seeks reversal of the judgment and remand of the case with direction to dismiss the action with prejudice; or, if this is denied, remand of the case to the district court for trial of issues relating to the claimed fraud, and to reliance, estoppel, clean hands, and plaintiff's timeliness.

STATEMENT OF FACTS

Plaintiff Vera T. Callister (herein called "Vera") was once married to Dr. Alfred Cyril Callister (herein called "Dr. Callister"), now deceased. On July 30, 1945, they were divorced (R. 1), and Dr. Callister was ordered to pay monthly alimony. As of early 1955, Dr. Callister's alimony payments were current, but in that year some payments were missed and at Dr. Callister's death on February 9, 1961, there had accrued under the terms of the decree a principal indebtedness of \$11,150.00 (R. 40).

Subsequent to his divorce, Dr. Callister married defendant, Lucy C. Callister (herein called "Lucy"),

and their marriage continued until Dr. Callister died. Lucy was appointed executrix, letters testamentary were issued, and she qualified on or about March 24, 1961 (R. 78). She has acted as executrix ever since.

On about August 7, 1961, Lucy as executrix delivered to the clerk of the court an "Inventory and Appraisalment" of the probate estate, along with an "Inheritance Tax Report and Appraisalment," completed except for valuations by appraisers (R. 85, 100). The probate inventory showed an estate of only \$809.12, but the companion inheritance tax report showed that less than three years before his death Dr. Callister had transferred a large number of shares of stock, and that when he died Dr. Callister and Lucy held a joint tenancy in two valuable parcels of local real property. The probate appraisal was filed officially on August 24, 1961 (R. 85), and the inheritance tax appraisal was filed officially on February 9, 1962 (R. 100-103).

Meanwhile, in June, 1961, Vera's counsel had filed a claim against the estate for \$11,400.00 alimony, and \$2,046.28 interest, and on November 1, 1961, the claim was rejected (R. 87-89). On November 8, 1961, James W. Beless, Jr., then Vera's only attorney of record, filed suit against Lucy to establish Vera's claim against the estate and, in effect, to set aside the transfers to Lucy by Dr. Callister (R. 21-26), the complaint alleging that the transfers were made "without consideration and with intent to hinder, delay and defraud plaintiff as a creditor," and that Lucy aided and abetted Dr. Callister in his fraudulent scheme. Lucy's answer admitted

the transfers, denied they were fraudulent within the meaning of the Fraudulent Conveyances Act (Title 25, Chapter 1, Utah Code Annotated 1953), and raised defenses of laches and estoppel, on the ground that Vera had led Dr. Callister to believe she would not collect the alimony, and that as a result Dr. Callister, who then had grounds for reduction of alimony, failed to obtain modification of the decree.

When the first action was brought, Vera's attorney knew there was a conflict of interest between Lucy and Vera, and that Lucy claimed the right to keep the property transferred to her by Dr. Callister (R. 21-23, 52:4-5).¹ He also knew there was no actual confidential relationship between the two women and that there had been ill feeling between them for many years (R. 52: 28-29). He was experienced in probate matters and knew that Lucy, at the same time she was defending a fraudulent conveyance action, would have to anticipate that the tax collectors would claim that Dr. Callister made the transfers "in contemplation of death" (R. 52: 10-11).²

The fact of the transfers was never kept from Vera; information about them was contained in the inheritance

¹ As the record has been put together, each deposition is given a separate page number. For convenience, depositions will be referred to by the record page number followed by the page number in the deposition, e.g., R. 52: 4-5 refers to pages 4 and 5 of the deposition of James W. Beless, Jr., and Vera T. Callister, found at page 52 of the record.

² Although Vera's counsel doesn't say so directly, his testimony has to mean that he believed the existence of the tax problem would help him force a settlement of the fraudulent conveyances action (R. 52: 11, 57a).

tax report and probate inventory which had been examined by Mr. Beless prior to bringing the action (R. 52:9-10). Allegations about the transfers of the property and the fraudulent intentions of Dr. Callister and Lucy in making them, in fact, comprised the bulk of the complaint in the first fraud action.

In preparing for trial of the first action Vera's counsel took Lucy's deposition and served interrogatories upon her. During the deposition Vera's counsel began to inquire about the stock transfers and the reasons for them:

"Q. (By Mr. Beless) Why were the transfers of the stock made in 1959 from your husband to you?

A. I didn't know they were made until after they had been made and my husband told me he thought it was best to put them in my name.

Q. When did you find out they had been made?

A. I don't think it was until in 1960 sometime.

Q. Did the dividends come in your name?

A. Yes they did" (R. 59:15).

But he abandoned the inquiry for no apparent reason and asked no more questions in the deposition or subsequent interrogatories (R. 31) about where or when conversations occurred; how Lucy learned of the transfers; or Dr. Callister's reasons for thinking "it was best" to put them in Lucy's name. He made no effort to interview other persons who might have knowledge of Dr. Callister's affairs because "they were all hostile"

(R. 52:18). But, notwithstanding the “representations” in Lucy’s inventories, answer to the complaint, deposition and answers to interrogatories, Vera moved forward with the action. On April 23, 1962, her counsel served and filed a “Notice of Readiness for Trial” (R. 39) in which he certified that he had interviewed all known witnesses he might call, used such discovery as he felt necessary, and concluded all necessary examinations and depositions. On September 26, 1962, a pre-trial conference was held by the court.

The Pre-Trial Order (R. 40-42) framed the following issues: whether in making the transfers Dr. Callister had an intent “presumed in law” to defraud his creditors; whether he was rendered insolvent; and whether Vera was estopped from asserting her claim against the estate. All pleadings were merged in the order, the effect of which was to eliminate from the case any issue as to whether Dr. Callister had the “actual intent” to defraud creditors (R. 40-42).

The order impressed Vera’s counsel with the “difficulties” in his case (R. 52:26), and regenerated thoughts of settlement. He returned to his office to write a long, analytic letter to Lucy’s counsel, suggesting that Lucy, by paying Vera’s claim, could save the difference between the amount of that claim and death taxes which might be imposed. (The letter is found at R. 52:57a, and is reprinted as Appendix “A” to this brief.) Although counsel’s calculations were erroneous—overstating the tax—the implications were clear. He rec-

ognized that Vera's claim of "fraudulent conveyance" was inconsistent with the anticipated Tax Commission claim that the transfers were includable for estate tax purposes because made "in contemplation of death." Payment to Vera would help convince the tax authorities that Dr. Callister's intent was to place the property beyond access of his former wife.³

It had been pointed out by Lucy's counsel that the court could find the transfers were made to defraud Vera as a creditor, while the taxing authorities could find that the transfers were "in contemplation of death"; also, that Lucy possibly could prevail in both cases (R. 52:20).

Negotiations opened by the Beless letter of September 26, culminated in compromise: Lucy was to pay \$4,000.00 to Vera in complete settlement of all her claims against Lucy, individually and as executrix.

The money was paid and a release executed and delivered by Vera. On October 10, 1962 (the date set for trial), the parties entered into a stipulation that the action be "dismissed with prejudice and on the merits," and on October 11 the following judgment was entered:

"Upon stipulation of the parties, and it appearing that the above entitled action has been fully compromised and settled, it is **ORDERED**,

³ If, as counsel contends (R. 52: 16)), he then believed Lucy's denial of actual fraudulent intent, the letter was in effect asking her to commit a fraud on the tax authorities by leading them to believe that the transfers were made with intent to defraud Vera, and not in contemplation of death. If he didn't believe it, there was no reliance at the time of settlement.

ADJUDGED AND DECREED, that the above entitled action be, and it hereby is, dismissed with prejudice and on the merits, each party to bear her own costs."

As anticipated by all, the taxability of the transfers became an issue, and in December Lucy presented to the State Tax Commission three affidavits relating to Dr. Callister's state of mind. Two affidavits from attorneys tended to show that Dr. Callister was concerned about his former wife's claim for alimony; the third, Lucy's own, contained a statement that Dr. Callister had once said (the date not being indicated) that he had made the transfers for the purpose of putting the property "beyond access of his former wife." A copy of Lucy's affidavit is found at R. 51 and in this brief as Appendix "B."

The Tax Commission did not accept the affidavits as conclusive as to intent and continued to claim the right to death taxes on the transfers. A compromise and settlement was stipulated between Lucy and the Tax Commission on July 12, 1963, under which Lucy paid the Tax Commission \$4,286.61 in estate taxes (R. 129), representing one-half of the amount that would have been payable if all of the transfers had been included in the gross estate. Thus Lucy had compromised two claims against her, both of which were based in large part, if not entirely, upon different, inconsistent states of mind on the part of Dr. Callister—who was no longer available to testify.

In March or April, 1963, Vera's lawyer learned of

Lucy's affidavit (R. 52:21, 28), but did nothing about it "because frankly I wanted to see what the Tax Commission did on this conflicting evidence," even though he knew Lucy was then attempting to resolve the tax dispute (R. 52:27). At that moment Vera's counsel had all the information he later felt to be necessary to support rescission of the settlement, but took no action with respect to rescission until August 27, when the present complaint was filed (R. 1-6). It was Vera's lawyer who told Vera of the affidavit and advocated the bringing of a second action (R. 52:28, 50).

For the purpose of this proceeding, the averments of the complaint are of little help; but the depositions of James W. Beless, Jr., and Vera, and Vera's affidavit, spell out what conduct Vera claims to have been fraudulent. Compare the following excerpts:

(1) From Vera's affidavit (R. 49-50):

"**** The above quoted facts (from Lucy's affidavit) were the very facts alleged by me to be true in the assertion of a claim in the estate of Dr. A. Cyril Callister, deceased, in the probate of which defendant was executrix and also in an action against defendant when said claim was denied. Defendant denied the truth of my allegations in the probate and in the action, but after I reduced my claim and compromised it and gave defendant a release based upon this denial, defendant filed the attached affidavit with the Tax Commission asserting the very things I had previously alleged and she had denied.

"In settling the action brought by me to establish my claim I relied on the denial by defendant

of Dr. Callister's intent to place them beyond my access, which denials were contained in her pleadings, deposition, and also in documents on file in the probate of Dr. Callister's estate.

"Had the defendant disclosed to me the above quoted facts which were known to her and which she, as executrix, had the duty to do, I would not have settled my claim for anything less than the full amount due plus interest."

(2) Vera's deposition (R. 52):

"We settled for that \$4,000.00 because I thought there was no other chance of getting it, to be exact, no other opportunity to get it" (R. 52:42).

* * *

A. I think I relied on my lawyer. If he had suggested that there was no chance of getting anything out of that debt that he owed me, I would have dropped it, yes.

Q. But your decision would have been based upon his judgment as to the probable outcome of the suit?

A. Well you usually do the thing that your lawyer thinks best" (R. 52:42).

* * *

"Q. Is it fair to assume then that the reason you settled the prior action was that your lawyer advised you that it was probably best to settle it?

A. Well he made me see that it was best" (R. 52:43).

* * *

"A. Yes, she was disputing it and I figured if \$4,000 was all I could get from what was owed

me, it was better to take that than to be pigheaded and not take anything.

Q. This was by way of a settlement of that suit?

A. Yes.

Q. You knew that she was paying you some money that she didn't concede was due to you either?

A. Why wouldn't she think it was due to me?

Q. She had been saying this all through the lawsuit, hadn't she?

A. Yes, I guess she had—that she paid me, that it came from her and not from the estate, the \$4,000?

Q. That is correct. You knew that it came from her, didn't you?

A. Yes, if she put it that way" (R. 52:44).

* * *

"A. *** I settled it for that \$4,000 strictly on the advice of my lawyer, that it was the best thing to do. *** Yes. We might have had nothing at all if we would have gone to court about it as far as I know" (R. 52:51).

* * *

"Q. Notwithstanding this affidavit, Mrs. Callister, you would probably have settled for \$4,000 even then if you had been advised by counsel that you should do so?

A. Well I think it's wise to take the opinion of counsel (R. 52:54).

From the foregoing excerpts it is clear that Vera settled the case on the advice of counsel. The following quotations from the deposition of J. W. Beless, Jr., make it equally clear that his advice was given not because of any belief in anything Lucy had told him or concealed from him, but upon his professional judgment that it would be difficult to prove a fraudulent conveyance by Dr. Callister:

Q. So that (prior to bringing the first action) you would be able to tell from examining those two documents that although the probate inventory listed assets of approximately \$800.00, the inventory for tax purposes listed assets in excess of One Hundred Thousand Dollars?

A. That is correct, and I had checked the record as to the real property owned by Dr. Callister and I had determined that there were two parcels owned by him and Lucy Callister as joint tenants" (R. 52:10).

* * *

"Q. When you say you felt you had a good lawsuit, you are speaking as of September 26, 1962?

A. That is correct.

Q. When did you change your mind about that?

A. I believe that I would say this: Shortly after the pre-trial conference before Judge Ellett. You possibly have the date of that there in your file.

Q. Yes, the pre-trial conference is dated September 26, 1962.

A. At that time I was faced with proving one of two things: One, that Dr. Callister was made insolvent by these transfers; two, that Dr. Callister intentionally made these transfers to avoid this creditor.

At that time I had taken the deposition of Lucy Callister and *I knew that I was faced with little proof as to his actual intent.* ***

Q. So that you were faced with the problem of proof on the actual intent?

A. I was, and at that time I did considerable research and my finding was that there was some Utah law in my favor but there was considerable law on the matter of insolvency which was definitely against me. And at that time, immediately after this letter, I conferred with you regarding the possibility of a settlement.

Q. That is right, you brought it up, didn't you?

A. I think this letter probably was the initiation of that settlement. There had been offers before that time. You had offered back in August of 1961 to settle it" (R. 52:12-13).

* * *

"Q. Forming your professional judgment as to the difficulties of proof of Dr. Callister's actual intent, I suppose you were aware of and somewhat concerned with the fact that communications from Dr. Callister to his then wife would be privileged?

A. Yes, I was very much concerned with that. In fact *this was why I felt that my only possibility was in either a presumption in law of intent, or in a possibility of the law being construed as to*

this matter of insolvency" (R. 52:14). (Emphasis added.)

* * *

"Q. Going back to the period starting with the initiation of the first action in November of 1961 and its settlement in 1962, I believe it was October, had Lucy Callister made any representations to you that changed your mind about the allegations as to the attempt to defraud that you had made in the complaint?

A. I think she had in this respect: Certainly her pleadings had specifically denied the intent of Dr. Callister and had denied her knowledge in the part where I allege she aided and abetted him in these transfers. And also when I took her deposition she stated specifically, in answer to my question as to whether she was familiar with her answer to my complaint, that she was. She also was acting as executrix here and I think that by the nature of her two inventories she made a representation here upon which we definitely relied.

I think that the representations that were made to me by Lucy Callister were her pleadings, the probate and inheritance tax inventories, and her reaffirmation of the effect of those in her deposition.

Q. Did you believe her when she said that these transfers weren't made for the intent of defrauding Vera?

A. I think after she made her reaffirmation in her deposition I did" (R. 52:15-17).

* * *

Q. So you don't know specifically of any communications that would have been made to (Lucy) strictly in her capacity as executrix that she hasn't disclosed? ***

A. I have no other information respecting his affairs. I can only rely on what was filed.

Q. What this reliance of yours boils down to is that if Mrs. Callister had told you of communications from her husband which would have been usable against her and which you had concluded would be sufficient to win the case for you, you wouldn't have settled it?

A. I certainly would not have.

Q. But other than the things she told you about the case in answer to questions in depositions and interrogatories, she never made any communications to you or directed any to you that kept you from going about your work to find out what the case was all about, did she?

A. No, I had no communication with her.

Q. That is right, so that you were free to go ahead and have your day in court?

A. That is correct. ***

Q. One thing I haven't got clear, you may have answered it, but I believe you said up until September 26 when you wrote the letter to me you believed you had a good lawsuit? *** Now what happened on that day which altered your judgment about the worth of the lawsuit?

A. I think Judge Ellett spelled out very clearly my difficulties in his pre-trial order" (R. 52:25-26).

Vera kept the \$4,000.00 (R. 52:44). Letting Vera have her cake and eat it must have concerned the trial

judge, for in setting aside the judgment and release he directed Vera to pay \$4,000.00 plus interest into the court, its disposition to await further order (R. 62).

On the basis of the depositions, Vera's affidavit, and the file in the previous case, the court ruled that the judgment should be set aside, for the following reasons:

“*** Lucy Callister as administratrix of the estate of Cyril Callister had a duty to marshal the assets and to recover all property transferred in fraud of creditors; that this duty as a court officer came ahead of any right that she might have had as an heir or as a transferee; that it appears she had a conflict of interest at the time; that since she was in possession of information that would have tended to have brought assets in the estate and by failing to resign, she has placed creditors in a position that they would not have been in if she had been attempting to marshal all the assets that could come into the estate; and that it appears to the court that this plaintiff in making the settlement did so without full knowledge of all of the information possessed by the administratrix at the time of the settlement” (R. 53-54).

ARGUMENT

I

THE RECORD IS DEVOID OF ANY EVIDENCE OF FRAUD ON THE PART OF DEFENDANT.

The Uniform Fraudulent Conveyances Act, adopted in Utah as Title 25, Chapter 1, Utah Code Annotated 1953, permits creditors to set aside certain conveyances by their debtors. In 25-1-4 U.C.A. 1953 there is a provision that transfers which render a person insolvent, or which are made when he is insolvent, are fraudulent as to his creditors; and under 25-1-7 conveyances made and obligations incurred "with actual intent, as distinguished from intent presumed in law," to hinder, delay or defraud present or future creditors are fraudulent as to them.

Vera's complaint in the original action alleged both of the statutory grounds for setting aside conveyances made by Dr. Callister, but Vera's counsel conceived some difficulty in establishing "constructive" fraud because Dr. Callister retained a joint tenancy interest in real property which greatly exceeded his indebtedness. Actual fraudulent intent was pleaded, even though Vera's counsel had no information supporting such an allegation (R. 52:8).⁴

Apart from the question of constructive fraud arising from insolvency, the complaint and answer put in issue the purpose—the state of mind—of Dr. Callister, since deceased, at the time he transferred some stocks in 1959.

It is common knowledge that when an owner of property transfers it he may be motivated by a number of factors, no one of which represents *the* reason for the

⁴ Does this violation of Rule 11 constitute "fraud"?

transfer. To reconstruct the specific intent of a deceased person it is usually necessary to rely upon circumstantial evidence, since the transactions are not often accompanied by declarations of intent and, when they are, the declarations may not be true. The greater worth of circumstantial evidence has been recognized in the cases. See 37 C.J.S., *Fraudulent Conveyances*, §422, p. 1267 et seq:

“*** Fraudulent intent may be established by proof of facts and circumstances from which such an inference may reasonably be drawn, such as the deed, the acts of the parties, and the surrounding circumstances, and it need not necessarily be proved as an independent fact; but all of the circumstances proved must be considered together. ***

“*Weight of direct testimony.* Fraudulent intent may be inferred from the acts done and the surrounding circumstances, which must be taken into consideration, notwithstanding the party making the transfer denies fraudulent intent. While it has been held that the fact of the testimony of one of the defendants who was a party to the conveyance which tends to show that it was without fraudulent intent, is not believable is not a circumstance from which such intent can be found, it has also been held that fraud may be established from the intrinsic improbability of, or contradictions in, the testimony denying fraud; and, where the testimony relied on show good faith in the making of a transfer is given by interested relatives only, the reasonableness or unreasonableness of their evidence has considerable weight.”

It is clear that in the first action Vera had access to circumstantial proof and was not dependent upon obtaining from Lucy a report of communications between Dr. Callister and Lucy before he died; and if she had learned of communications between husband and wife, there is serious doubt whether the information could have helped her in the trial of her case. The statement referred to in Lucy's affidavit to the Tax Commission was probably privileged under the provisions of 78-24-8 U.C.A. 1953, since the privilege continues to exist though the marriage has ended by divorce or death. And if, for some reason, it were held that the privilege did not apply, still it is doubtful that a statement made by Dr. Callister *subsequent* to the transfers (R. 54-55) would be admissible in evidence against Lucy. See two annotations relating to admissibility of statements of a transferrer in an action against a transferee in 64 A.L.R. 797 and 83 A.L.R. 1446.

The affirmative representations upon which Vera claims to have relied are described by her counsel as "her pleadings, the probate and inheritance tax inventories, and her reaffirmation of the effect of those in her deposition" (R. 52:17).

The pleadings aren't fraudulent. Lucy presently contends and has contended all along that the transfers weren't made with intent to defraud Vera. The evidence was such that a trier-of-fact could find that the transfers were made "in contemplation of death," or for the purpose of seeing that the parties' young son was cared for,

or out of gratitude. Denial of averments of fraudulent intent was based upon more substantial evidence than the averments themselves. There was good ground to support the answer and it was properly entered under Rule 11, notwithstanding there might have been some evidence supporting the complaint.⁵ Under Vera's theory every litigant who lost a fact issue would be fraudulent *ab initio*.

The inventories aren't fraudulent. They show on their face that the transfers were made and that Lucy doesn't consider the property to be part of the estate. There is no contention that the property *wasn't* transferred. Fraudulent conveyances are voidable, not void. Moreover, these "representations" were made before the first case was filed, so there couldn't have been any reliance upon them.

The deposition isn't fraudulent. We have searched in vain for Lucy's "reaffirmation of the effect of those" (R. 52:17). Vera's counsel had the opportunity to cross-examine Lucy at length about the transfers but didn't do it. Her deposition contains no statements inconsistent with her later statements or her later conduct. Perforce, Vera's counsel "had to rely on the general tone of her deposition" (R. 52:18).

Inasmuch as there were no actionable misrepresentations, the only thing left is a failure to disclose. The

⁵ Judge Ellett's order reinstated the fraudulent conveyance issue as one to be tried. Does Lucy now have a duty to amend her answer and admit the conveyances were made with intent to defraud Vera, i.e., confess judgment? Is her failure to do so fraudulent?

trial court took the view that Lucy had a duty to tell Vera about a post-transfer, out-of-court declaration made by Dr. Callister. This is not the law with respect to litigants generally.

There aren't very many cases in which it has been argued that one litigant has a duty voluntarily⁶ to disclose to his adversary the existence or source of evidence helpful to the adversary's case. When the argument has been made, it has generally been rejected. The question was considered by the Supreme Court of Kentucky in two early cases, *Mills' Heirs v. Lee*, 22 Ky. 91, 17 Am. Dec. 118, and *Taylor v. Bradshaw*, 22 Ky. 146, 17 Am. Dec. 132. The *Mills' Heirs* case arose out of an action between claimants to real property, which action had been compromised by Mills with Lee and Graham. After Mills's death, his heirs sought to set aside the compromise on the ground that at the time of the settlement Lee and Graham had known of an entry in the land records that tended to prove their claims invalid. The court held that failure to disclose the entry was not fraudulent concealment, saying:

“The compromise of a doubtful claim cannot be set aside, but for fraudulent misrepresentation of facts, or fraudulent concealment of facts, or such imposition otherwise as amounts to unconscientious and unfair dealing.

⁶ In discussing the duty to disclose evidence, we have inserted the word “voluntarily” although it is not generally used by the courts. We have done so in recognition of the right to compel disclosures by means of various discovery devices provided for in the Utah Rules of Civil Procedure.

“We say fraudulent concealment of facts, because a concealment of that which a party was not bound to disclose, would not be ground for avoiding a compromise. Suppose Lee and Graham had known that these warrants had been assigned away after the survey of 1784 had been executed, and that other lands had been surveyed in 1785, and believed, as they state, that those assignments had been illegally and surreptitiously made, were they bound as suitors in court, upon a treaty of compromise, to have disclosed the facts to their adversary, to strengthen his defense in case no compromise was effected. To say that they were, would be to lay down a rule too refined for the common sense and understanding of upright men. It would, in effect, prescribe to those in a treaty for a compromise of doubtful conflicting claims, the duty to disclose the weaknesses, doubts and difficulties of their respective claims and discourage all compromises.

“*** In the present case the end and aim of the parties in contracting and compromising an existing suit was to avoid the hazard and expense of litigation. No reasonable man ought to expect in such communication that the one party or the other is bound to mutual disclosure of the means of attack and defense in case the compromise does not succeed. Such a rule would forbid all attempts at compromise.”

Taylor v. Bradshaw involved an occupier's claim for improvements in an ejectment action. Commissioners fixed the amount to be allowed but thereafter an equitable action was brought for relief from the judgment on the ground that the occupier had fraudulently concealed facts showing that he had no color of title and was

not an "occupying claimant." In denying relief the court said:

**** It would be going further than we have any recollection of any court having gone, and further than any court ought to go to fix upon Bradshaw the commission of fraud, merely because he did not disclose to his adversary all the circumstances within his knowledge that might tend to weaken his claim or defeat his recovery.

"From those who have reason to expect information from us the truth should not be withheld, but such as look not to us for information and expect no disclosure from us, have no cause to complain of our silence, and to reproach us for not speaking with having suppressed the truth.

"By the act of Bradshaw's asserting claims for improvements the appellants were admonished not to expect from him a disclosure of any which would prove he was not entitled to the benefits of the occupying claimant's law, and it would be preposterous to suppose that they were deluded and deceived by any failure of his, in not disclosing to them evidence which might defeat his claim."

When Lucy claimed the right to property transferred by Dr. Callister and denied Vera's claim against the estate, Vera was admonished not to expect from Lucy a disclosure of anything which would tend to prove that the conveyances were fraudulent, and it would be preposterous to suppose that she was deluded and deceived by any failure to disclose to Vera evidence which might help establish her claim. The aim of the

negotiations was to compromise and settle a disputed claim, and it would have been unreasonable for Vera or her counsel to expect that Lucy would make known to them evidence which might be used by them to her detriment if a compromise were not agreed upon.

Indeed, the depositions of Vera and her lawyer clearly show that there was no "reliance" on any fact as "true," but only a professional judgment by Vera's lawyer that a pigeon in the hand was better than a golden eagle in the bush. Since Vera relied on this judgment, she cannot now claim she relied on Lucy's honorable intentions toward her. See *Colton v. Stanford*, 82 Cal. 351, 23 Pac. 16, 16 Am.St.Rep. 137, in which the Supreme Court of California said:

"Whatever may have been said as to the presumptions arising out of proof of a fiduciary relation, the fundamental principle upon which rescission is granted is always, and under all circumstances, the claim and consideration that confidence has been reposed, and that confidence has been abused. No such claim can in reason be made where the party seeking rescission—being of competent age and understanding, and acting only in his own interest—has undertaken to investigate for himself, called in experts, been given free and fair means of ascertaining the truth, acted upon his own judgment and the advice of friends, and repudiated any confidence in or reliance upon the parties within whom he was dealing. It matters not what the relations of the parties have been prior to, or are at the time of, the negotiations for a settlement and compromise of their disputes, the principle is one of universal

application, and it is a principle of common sense and of good policy.***

“*** If, at the time of the purchase or compromise, the trustee has shaken off his fiduciary character, and the confidence which is presumed to result therefrom, it matters not what has occurred immediately preceding or long prior to the final transaction. In other words, if the transaction is one in which the trustee may lawfully deal with the *cestui que trust* by first dissolving the trust relation, it is not too late for him to do so at any time before the *cestui que trust* is prevented from making a full and fair investigation in consideration of the business in hand, and before he executes the contract.***

“Under such circumstances, is plaintiff entitled to a rescission of the contract thus deliberately entered into? We think she is not. Her counsel claims there was actual and constructive fraud. *** They say that defendants furnished a list of the assets of the Western Development Company; that this was equivalent to a positive assertion that the list contained all of the assets—an assertion not true, not warranted by the information of the parties making it, and therefore fraudulent, although they believed it to be true; *** but the rule as stated is not, upon authority or principle, applicable where such party, discarding the representation as unworthy of belief, proceeds to inquire for himself, is given full and fair facilities of informing himself, takes independent counsel, and finally acts upon his own judgment and that of his advisors. Misrepresentations cannot be predicated upon such a state of facts.”

As pointed out hereinafter, there is respectable authority that Lucy never occupied a fiduciary position

with respect to Vera; but if she ever did, the relationship was terminated when Vera renounced it, made a claim against the estate, retained counsel, and brought suit against Lucy, as executrix and individually, claiming that Lucy and her late husband had conspired to defraud Vera as a creditor, and that Lucy's individual property was subject to her claim.

"The essence of the test is whether or not under all of the circumstances the transaction carries the earmarks of an arm's length bargain." *Pepper v. Litton*, 308 U.S. 295, 60 S.Ct. 238, 84 L.Ed. 281. The transaction between Lucy and Vera was at arm's length, through counsel, and Lucy had no duty to disclose facts that might weaken her case. *Thompson v. Kansas City C.C. and St. J. Ry. Co.*, 224 Mo. App. 415, 27 S.W.2d 58; and *Western Grain Company Cases*, 264 Ala. 145, 85 So.2d 395, containing a lengthy analysis of various fiduciary relationships and the duties of disclosure arising out of them.

In the first action—as in this one—Vera and Lucy were antagonistic adversaries.⁷ Vera didn't rely on Lucy to pay her claim, or to do anything for her, but employed counsel and set about to establish a claim to reach Lucy's property. Actionable fraud requires a misrepresentation or fraudulent concealment of a material fact and — among other things—reliance by the party claiming fraud. *Oberg v. Sanders*, 111 Utah 407, 184 P.2d 229; *Pace v. Parrish et al*, 122 Utah 141, 247 P.2d 273.

⁷ If the parties^{now} wished to compromise and settle, could Lucy do so with any assurance of finality? She is still executrix.

Under all the facts and circumstances, not only was the court not justified in finding fraud, it was required to find that there wasn't any fraud.

II

THE FRAUD RELIED UPON BY PLAINTIFF, IF THERE WAS ANY, IS INSUFFICIENT IN LAW TO JUSTIFY THE TRIAL COURT IN SETTING ASIDE A JUDGMENT, AND THE DEFENDANT IS ENTITLED TO A DISMISSAL AS A MATTER OF LAW.

The fraud claimed by Vera as the basis for setting aside the prior judgment relates directly to a factual issue in the prior action, viz., the actual intent of Dr. Callister when he transferred property to Lucy; and this court has recently ruled upon the type of fraud which must be present to justify setting aside a judgment. In *Haner v. Haner*, 13 Utah 2d 299, 373 P.2d 577, a motion had been made to have a judgment set aside, one of the grounds being that the defendant had made false representations in procuring the judgment. Denial of the motion was affirmed, the court saying:

“***Inasmuch as the plaintiff here seems to be relying on the ground of fraud, there is a distinction which it is necessary to point out. In order to justify granting relief, the alleged wrong would have to be of the type characterized as extrinsic fraud: That is, fraud based on conduct or activities outside the court proceedings them-

selves; and which is designed and has the effect of depriving the other party of the opportunity to present his claim or defense. This type of fraud, which is regarded as a fraud not only upon the opponent, but upon the court itself, can be accomplished in a number of ways, such as making false statements or representations to the other party or to witnesses to prevent them from contesting the issues; or by that means or otherwise preventing the attendance of the parties or witnesses; or by destroying or secreting evidence; so that a fair trial of the issues is effectively prevented.

“It is obvious that quite a different situation exists where there is no prevention of the parties contesting the issues in a trial, and where the complaint is simply that one party presented perjured testimony or false evidence. This charge is simply a continuation of the same dispute which the trial was supposed to resolve. It is the purpose of the law to afford the parties full opportunity to have themselves and their witnesses present; and to present their evidence and their contentions to the court. When this has been done and the court has made its determination, that should end the matter, except for the right of appeal. It is so patent as to hardly justify comment that a judgment should not be set aside merely to grant the losing party another chance to accomplish the task at which he just failed; to prove that he was right and the opponent was wrong. To re-open a case just because a party persists in asserting and attempting to prove that his version of a dispute was the truth and that of the opponent was false would open the door to a repetition of the procedure, whoever won the next time; and thus to keeping the dispute going

ad infinitum with no way of determining when the merry-go-round of the lawsuit would end.”

See also *Wright v. W. E. Callahan Construction Co. et al*, 108 Utah 28, 156 P.2d 710, to like effect.

In the above cases, the “fraud” relied upon was perjured testimony, or something similar. In the present case, no perjured testimony is involved, the claimed fraud being the failure of Lucy to disclose evidence which might tend to weaken her case. This is not extrinsic fraud.

Burch v. The Hibernia Bank et al., 146 Cal. App. 2d 422, 304 P.2d 212, was an action for fraud and restoration of a leasehold, the plaintiff’s rights having been adjudicated in a prior action brought by defendant bank. Plaintiff claimed the bank had misrepresented to plaintiff and the court the nature of its rights in the property, the existence of a U.S. District Court injunction affecting the bank’s right to foreclose. The trial court ruled against plaintiff as a matter of law and the District Court of Appeals affirmed, saying:

“The concealment of a party of evidence which, if disclosed, would tend to overthrow his case is not extrinsic fraud. *Hogan v. Hogan*, 131 Cal. App.2d 281, p. 284, 280 P.2d 64, at page 66, says: ‘It is settled in this State that a judgment will not be set aside because it is based upon perjured testimony or because material evidence is concealed or suppressed, that such fraud both as to the court and the party against whom judgment is rendered is not fraud extrinsic to the record for which relief may be had.’

“*** The allegations as to what (The Hibernia Bank) did and did not do in that suit are in effect that the judgment was obtained by perjury, false evidence, and concealment of other evidence. The alleged concealment went to the merits of the cause submitted for judgment. If there was fraud it was intrinsic, not extrinsic (citing cases). The rule is the same whether the judgment sought to be set aside is a default judgment or rendered after answer and contested trial (citing cases).***

“The representations alleged to have been made to plaintiff by Hibernia prior to the quiet title suit as to its legal position, identical with its claim in the suit, do not constitute extrinsic fraud (citation). Such alleged representations were merely that Hibernia had a superior title. They were exactly the same representations made to the court in the suit to quiet title. To be extrinsic the fraud must be collateral to the matter which was tried and determined by the court (citations).***”

A like holding is found in *Pietro v. Pietro*, 147 Cal. App.2d 788, 305 P.2d 916, an action to set aside a divorce decree on the ground that it was obtained by fraud. One of the grounds relied upon was that the wife's attorney in the divorce case had retained two written agreements which prevented the plaintiff from proving ownership of property in dispute. The court held the complaint insufficient:

“Plaintiff's first charge is that Madeline's attorney retained two written agreements which prevented him from proving his ownership of the property. Plaintiff could have forced the production of these documents by subpoena duces tecum

directed to her counsel, or by an appropriate demand in open court. Concealment by a party of evidence which, if disclosed, would tend to overthrow this case, is not extrinsic fraud and therefore is not grounds for a suit to set aside a judgment."

Dr. Callister's state of mind at the time he transferred property was an issue directly involved in the previous case. Therefore, any fraud with respect to that state of mind, either by perjury or concealment, would be intrinsic and not a basis for setting aside the judgment unless the relationship between Vera and Lucy was such that there was a special duty of disclosure.

III

THERE WAS NO FIDUCIARY RELATIONSHIP BETWEEN PLAINTIFF AND DEFENDANT WHICH PLACED UPON THE DEFENDANT A DUTY TO DISCLOSE TO THE PLAINTIFF EVIDENTIAL FACTS AFFECTING THE OUTCOME OF THE PRIOR ACTION.

Vera takes the position that because she asserted a claim against the estate (even though it was denied and has not been established by judgment) there arose a fiduciary relationship between her and Lucy which required Lucy to disclose to her everything Lucy knew that might aid her claim against Lucy as an individual—regardless of how or in what capacity Lucy acquired

the knowledge. Neither history nor common sense supports the proposition.

At common law a personal representative had no standing to bring an action to recover assets conveyed by a decedent in fraud of creditors. See 2 *Bancroft's Probate Practice* (2nd Edition) §474, wherein it is stated:

“There is a clear distinction between an action attacking a conveyance or transfer on the ground of fraud or undue influence of the grantee or transferee, and an action to set aside a conveyance by the decedent as in fraud of creditors. Since the decedent could not himself take advantage of his own fraud, he would have no right of action in the latter instance were he alive. It is therefore an anomaly in the law if a right of action exists in the executor or administrator of the decedent after his death, and it is evident that, *in the absence of statutory power, no right of action could inure to the personal representative of the decedent as such to sue to set aside the latter's conveyances in fraud of creditors*, although the creditors might maintain an action for their own benefit and in their own right. There is apparently nothing, however, to inhibit the legislature from making the executor or administrator the statutory agent for the creditors for the purpose of bringing such action. As shown in the next section, in fact, statutes now exist in most of the western states which expressly so empower and require the representative to act.” (Emphasis added.)

Utah has a statute under which a personal representative must bring action in behalf of creditors if cer-

tain conditions are met. 75-11-13 U.C.A. 1953. But the duty is limited by 75-11-14 U.C.A. 1953, which provides that the personal representative need not bring suit except upon application of the creditors who will pay the costs of the suit or put up such security as may be ordered by the court.

Vera never did make a demand upon the personal representative that suit be brought; neither did she offer to pay the expenses of such a suit; nor, as she might have done under the authority of *Farnsworth et al. v. Hatch*, 47 Utah 62, 151 Pac. 537, did she make an effort to have the executrix removed because of an obvious conflict of interest known to Vera and her counsel (R. 52:4, 39, 45). Yet they now contend that Lucy should have acted in a manner that—as recognized in *Farnsworth*—interested parties cannot reasonably be expected to act:

“In the nature of things, it is not possible for any one to act with perfect impartiality and fairness in a matter which he claims valuable and important interests. The fact is universally recognized, and especially in our courts of justice, and the only reason that it is not always strictly applied is because it is impractical to do so.”

This court has held that a creditor may not bring an action in his own name to set aside a conveyance by decedent without having made an unsuccessful demand on the personal representative to bring the action. *Fehring v. Commercial National Bank of Ogden*, 23 Utah 393, 64 Pac. 1108. On the other hand, it has been held that where the alleged fraudulent grantee is also the

personal representative the action may be brought by the creditors. 2 *Bancroft's Probate Practice* (2nd Ed.) §477. That is what Vera did in this case; but recognition of her right to sue is of necessity based upon a recognition that her interests are in conflict with Lucy's interests as executrix, and that it would be unrealistic to expect Lucy to protect Vera's claim. See *Emmons v. Barton*, 109 Cal. 662, 42 Pac. 303, in which a creditor was permitted to bring action against the grantee-executrix without prior demand, and in which, incidentally, the California Supreme Court held that statements of the deceased husband, made after the conveyance about title to the property, were erroneously admitted against the executrix.

A case factually quite similar to the present one is *Borge v. Traaen*, 158 Ore. 454, 75 P.2d 939, 76 P.2d 1127, wherein a decedent, while indebted to the claimant, had conveyed to his wife through a third person certain North Dakota real property. The property was not listed in the probate inventory. After the estate was closed the claimant, holder of a note upon which approximately \$3,000.00 was due, brought an action against the widow and erstwhile executrix to impress a trust upon proceeds obtained from sale of the North Dakota property, on the theory that the creditors had been defrauded by failure of the widow to disclose the transaction by which the property was conveyed to her.

The court noted that the indebtedness had never been reduced to judgment, and that no claim had been presented to the administratrix. It held that an equitable

lien is not available to a creditor until he has disclosed that the debtor is insolvent and, further, that "one of the first requisites in maintaining a creditor's bill is that the creditor has established his claim or debt by judgment at law." It was held that before the claimant could maintain such suit he had to reduce his claim to judgment.

Commenting on the relationship between the claimant and the personal representative, the Supreme Court of Oregon said:

"According to the allegations of the complaint, the farmland in North Dakota was not owned by Thomas Traaen at the time of his death. Neither it nor the contract for its sale was property which should have been listed or inventoried as a part of his estate. No fraud, therefore, was committed by the administratrix in omitting to list or inventory that land or the value of the contract for its sale. If Thomas Traaen was insolvent at the time he conveyed the property, and if he so conveyed or transferred it in order to hinder, delay, or defraud his creditors, the plaintiff could have brought proceedings against him during his lifetime, to have such conveyance declared void insofar as her claim against him was concerned. Even though she had not brought such proceedings against him, she still, upon the approval of her claim by the administratrix or by the court, could have caused proper proceedings to be instituted by the administratrix under sections 11-633 and 11-634, *supra*, and if the administratrix had been a party to such conveyance, she could have been removed and another administrator appointed. Since the plaintiff did not follow either procedure, she is not now,

after her claim against the estate is barred by her failure to file it, in a position to maintain this suit.

“The excuse given by the plaintiff *** for not presenting her claim to the probate court was that the inventory showed that the assets of the estate were only \$750.00, and the fraud complained of is the failure of the administratrix to list among the assets of the estate the property owned by her which was fraudulently conveyed by Thomas Traaen.

“Numerous authorities are cited by the appellant to the effect that an heir of the decedent may, when the administrator or executor has fraudulently concealed property which rightfully belongs to the heir, bring a suit in equity against such administrator or executor after the estate of the decedent has been closed. To the same effect, cases may be cited involving the failure of a guardian to account for property belonging to his ward. That such decisions are not here in point is too obvious to require discussion.”

The above case is important not because Lucy objects to the procedure chosen by Vera, but because it shows that technically Vera was not a creditor and, also technically, there was no fiduciary relationship.

Assuming, for sake of argument, that there is a fiduciary relationship (for some purposes) between a claimant and an executrix, there is still the problem (suggested by cases cited under Point I) of circumscribing the duties of the executrix and determining the areas in which the “trust and confidence” may exist.

That a fiduciary relationship may create duties only with respect to particular property held by or particular

kinds of transactions entered into by the fiduciary was recognized by this court in *In Re Blodgett's Estate*, 93 Utah 1, 70 P.2d 742. One of the beneficiaries, Mrs. Blodgett, contended that a contract relating to distribution of the estate should be set aside because of the failure of Mr. Crosby, co-heir and administrator, to make full disclosure. Mrs. Blodgett contended that she and Crosby occupied a fiduciary and confidential relationship and that Crosby had the burden of proving at least *prima facie* that he had not concealed information he was duty bound to disclose, nor suppressed property belonging to the estate. Crosby contended that there was no *actual* relation of confidence because Mrs. Blodgett was distrustful of Crosby, had her own attorney and relied on him rather than on Crosby. The court said:

“Mrs. Blodgett was a beneficiary or, perhaps to put it in a form to better suit appellant’s counsel, she had an interest in the estate. Likewise did Crosby. Crosby was also the administrator or manager of the estate in Utah. As administrator he had the duty to make full disclosure of all matters and information regarding the estate. It is not unlike a partnership where one partner manages the business. He must make full disclosure of his acts and the state of the business and render a correct accounting. But being the superior party in such case did not mean that he is under obligation to advise his partner in matters affecting a conflict of interests between themselves. As to external affairs of the estate, yes, but *there is no obligation on the part of one heir who is an administrator to either give advice or wisdom to a co-heir in matters where there is a*

conflict or a controversy as to the extent or nature of their respective rights. His duty as administrator went to the obligation to take into possession and disclose all estate property and all information to those interested in the estate as to estate matters, thus putting them on the same plane as he was as to such information regarding all the assets and transactions, but, when that is done, he has performed his duty to a party in regard to whom he is in controversy as to their respective interests. In that relationship, after they are on an even plane as to all estate matters, she must exercise the decisions as to whether she will stand firm or recede in the controversy between them as to differences of opinion regarding their rights.***

“All we need to do is to determine if there were reasonable grounds for controversy and, if so, whether he furnished her full information as executor from which she could decide in their controversy as beneficiaries what she would or would not do. When he did this and she was fully informed and acted not on his advice, which he was not required to give, but on her own judgment and on that of her attorney Styskal, he had no responsibility for her decisions.***

“We have attempted to draw the line of his duties. We do not need to indulge in phrases or applications of doctrines. Nor do we need to cite cases. The law is plain that *he has his duty as trustee to her and as such it must be fully performed. But, once performed, it does not extend into a field where trusteeship stops and adverse interest begins.*” (Emphasis added.)

The court went on to decide that there was no such failure to disclose as would warrant invalidating the

agreement between the manager of the property for Utah and his co-heir, Mrs. Blodgett.

Our own situation is somewhat analogous. Not only was there no actual relationship of trust and confidence between Vera and Lucy, there had been "bad blood" between the two women ever since Dr. Callister and Vera were divorced, and, as indicated by Vera's counsel, one of the ideas behind settlement of the suit was "not to have two mean-mad women in court together at the same time at the same place" (R. 52:29).

A principal similar to that announced in *Blodgett* was recognized by the Supreme Court of California in *Jorgensen v. Jorgensen*, 32 Cal.2d 13, 193 P.2d 728, involving a property settlement between a husband and wife at the threshold of divorce. The wife, claiming that her husband had fraudulently concealed information or made misrepresentations as to the classification of property which was community property, sought to vacate the settlement, relying upon a well-established California rule that one spouse has a fiduciary duty to disclose community assets to the other.

In the fraud action the wife contended that certain corporate shares had been community property when the property settlement agreement was executed, but through the husband's fraud the property settlement agreement provided that the shares were his separate property. She contended that the part of the decree approving the agreement was induced by defendant's false representations and that, because of the relation-

ship, the fraud was extrinsic, entitling her to equitable relief from the decree. The Supreme Court disagreed:

“As manager of the community property the husband occupies a position of trust (Civil Code, §§172-173, 158), which is not terminated as to assets remaining in his hands when the spouses separate. It is part of his fiduciary duties to account to the wife for the community property when the spouses are negotiating a property settlement agreement. The concealment of community property assets by the husband from the wife in connection with such an agreement is therefore breach of a fiduciary duty of the husband that deprives the wife of an opportunity to protect her rights in the concealed assets and thus warrants equitable relief from a judgment approving such agreement. *** The issue in the present case is whether under the facts stated in her amended complaint the wife was deprived of a fair opportunity to submit her case fully to the court because of a breach of a fiduciary duty of the husband. There is no allegation in the complaint that defendant concealed assets that were part of the community property. *The assets were disclosed, and the complaint is based on the theory that defendant fraudulently claimed certain community property as his separate estate.* The classification of property as separate or community is frequently difficult. A husband at the time of divorce or separation is entitled to take a position favorable to his own interest in claiming as his separate property assets that a court might hold to be community property. *Confronted with the assertion by the husband that certain assets are his separate property the wife must take her own position and if necessary investigate the facts.****

If the wife and her attorney are satisfied with the husband's classification of the property as separate or community, the wife cannot reasonably contend that fraud was committed or that there was such mistake as to allow her to overcome the finality of a judgment. In the present case plaintiff alleged that she and her attorney relied exclusively on her husband's representations that the shares in question were his separate property and that her attorney made no examination or investigation to ascertain whether the shares were community property. She did not allege that her attorney intentionally failed to protect her interests. Plaintiff is barred from obtaining equitable relief by her admission that she and her attorney did not investigate the facts, choosing instead to rely on the statements of the husband as to what part of the disclosed property was community property." (Emphasis added.)

In our case, too, the assets were disclosed and the dispute was as to whether property was conveyed with fraudulent intent or for other purposes.

If Lucy had been removed as executrix, and Vera had established her claim at law, and a new personal representative had brought action against Lucy to recover property conveyed by Dr. Callister during his lifetime, there would have been no fiduciary relationship between Lucy and the new personal representative, and no duty to disclose evidence which might tend to weaken Lucy's defense. The situation should be no different because Vera decided to get a lawyer and enforce her claim for herself.

IV

A PROCEEDING TO SET ASIDE A JUDGMENT AND RELEASE IS AN EQUITABLE ACTION, AND THERE WERE TRIABLE ISSUES OF FACT UPON WHICH THE PLAINTIFF'S RIGHT TO RELIEF WAS DEPENDENT.

Proof of fraud requires "clear and convincing" evidence of the various elements of fraud. *Ferrell v. Wiswell*, 45 Utah 202, 143 Pac. 582. Vera was required to prove the representation or concealment of a material fact, its falsity or the fraudulent character of the concealment, reliance, knowledge that the complaining party was relying upon the stated fact or non-existence of the concealed fact, and resulting damage. See *In Re Madsen's Estate*, 123 Utah 327, 259 P.2d 595, 606.

Although Lucy had not disclosed to Vera that Dr. Callister had made the statement referred to in the affidavit to the Tax Commission, there is evidence from which it could be found that there was no reliance upon the failure to disclose and no damage because of the failure, that the statement by Dr. Callister was not material, and that Lucy had no intention to mislead Vera by not disclosing the fact.

In light of the depositions taken in the two actions, Vera's affidavit is not sufficient to support a summary judgment. As pointed out by the United States Supreme Court in *Sartor v. Arkansas National Gas Corp.*, 321 U.S. 620, 628, 64 S.Ct. 724, 88 L.Ed. 967, 973, a

summary judgment should not be used to withdraw witnesses from cross examination, "the best method yet devised for testing trustworthiness of testimony. And their credibility and the weight to be given to their opinions is to be determined, after trial, in the regular manner." And, as said in *Sonnenheil v. Christian Moerlein Brewing Co.*, 172 U.S. 401, 408, 43 L.Ed. 492, 495, 19 S.Ct. 233, "the mere fact that the witness is interested in the result of the suit is deemed sufficient to require the credibility of his testimony to be submitted to the jury as a question of fact."

Mr. Beless admits that he knew of Lucy's affidavit to the Tax Commission in late March or early April, 1963. But he took no prompt action to disaffirm the compromise and settlement despite his knowledge that Lucy was involved in attempting to settle a tax claim the validity of which would depend upon an intention on Dr. Callister's part inconsistent with the intention averred by Vera to be true in her previous action against Lucy, and to be averred in her present one. Such conduct may estop Vera from obtaining rescission. See 31 C.J.S., *Estoppel*, §98. Estoppel is a question of fact, and, the issue having been made known to the trial judge (R. 55), it should not have been determined by summary judgment.

Related to estoppel is a rule that one who seeks to cancel an instrument on the ground of fraud must, upon learning of the fraud, immediately make his decision as to whether to stand on the agreement or renounce

it and must thereafter continue firm in that purpose. *Taylor v. Moore et al.*, 87 Utah 493, 51 P.2d 222; *Le-Vine et al. v. Whitehouse et al.*, 37 Utah 260, 109 Pac. 2; 12 C.J.S., *Cancellation of Instruments*, §38, p. 999.

The reasonableness of the delay and the timeliness of action to rescind are fact questions. See *Union Pacific Railway Co. v. Whitney* (8 Cir.) 198 Fed. 784; *Graham v. Atchison Topeka & Santa Fe R. Co.*, (9 Cir.) 176 F.2d 819; *Brown v. Hassenstab*, 212 Or. 246, 319 P.2d 929; *Althoff v. St. Louis Transit Co.*, 204 Mo. 166, 102 S.W. 642.

Then there is the question of Vera's "clean hands" in negotiation of the settlement. Her counsel's letter of September 26, 1962, was sent (if he is to be believed) after he had come to the conclusion that Dr. Callister transferred the property without intent to defraud. Yet he suggested to Lucy that a settlement could be to her advantage because it would lead the tax authorities to believe that the transfers *were* made with the intention of defrauding ^{Vera}~~Lucy~~, rather than in contemplation of death. The main difference in what Mr. Beless suggested and what happened was that the amount paid to Vera was less than what he asked for. The letter of September 26, 1962, was a shameless invitation to Lucy to commit fraud upon the government by trying to convince the government the facts were different from what they believed them to be.⁸

⁸ "Shameless" on their part—not on Lucy's. Lucy had contended all along that she didn't know what Dr. Callister's "actual intent" was. This was still her attitude before the Tax Commission.

Under these circumstances a court of equity (as fact finder, not via summary adjudication) could find that Vera did not come into the case with clean hands, and that Lucy did no more than what Vera had invited her to do, in which case relief would be denied. See *Delgado v. Delgado*, 42 N.M. 582, 82 P.2d 909; and 30 C.J.S., *Equity*, §93.

V

THE TRIAL COURT ERRED IN RE-INSTATING THE PREVIOUS ACTION AND SHOULD HAVE REQUIRED THE PLAINTIFF TO INITIATE A NEW ACTION AGAINST THE ESTATE OF ALFRED CYRIL CALLISTER, DECEASED.

It is generally held that in equitable actions to enjoin the enforcement of a judgment the relief is limited to prohibiting the party from enforcing the judgment, and that a court of equity may not order a new trial of the law action. *Idaho Globe Dredging Corp. v. Boise Payette Lumber Co.*, 60 Idaho 127, 90 P.2d 688. This procedural rule is important in this case because of obligations imposed upon the plaintiff by 75-9-9 U.C.A. 1953, which provides that action on a rejected claim must be brought within three months after the filing of the notice of rejection.

We recognize that the period within which the claimant would be entitled to bring her action frequently would be affected by existence of the action which was

dismissed with prejudice, and that Lucy might not be permitted to contend that the limitation period expired while the other case was pending. We do believe, however, on authority of *Free v. Farnsworth et al.*, 112 Utah 410, 188 Pac. 731, that when Vera went into equity to prevent the enforcement of the judgment she impliedly consented that if the judgment was improperly granted, Lucy should not be placed at a disadvantage by reason of the delay.

Here there was a delay after Vera learned all the facts—or was charged with knowledge of them—in late March or early April, 1963. She failed to take any action with respect to the judgment for a period in excess of the limitation period prescribed by 75-9-9.

Her obligation to bring the revived action within the time specified by statute is a matter that should be considered by the trial court, but which probably cannot be considered because of the character of the trial court's order. Even if Vera may be able to establish some reasons why the limitation would not apply, it is a matter upon which Lucy ought to be heard.

CONCLUSION

In this case, notwithstanding personal ill-will, reliance upon counsel's professional judgment, arm's length dealings, and access to court processes for determination of facts, the trial court has ruled as a matter of law that an executrix even though sued in her individual capacity for conduct antedating the death of her testator, has a

duty voluntarily to disclose to her adversary any evidence which might, if admitted at the trial, tend to prejudice the executrix's defense, and that the duty encompasses disclosure of confidential communications between husband and wife.

Moreover, the trial court made this "matter of law" ruling notwithstanding the existence of the following problems:

(1) Application of the doctrine of clean hands.

(2) Vera's admission that she relied on her counsel and her counsel's admission that he recommended settlement upon his professional judgment as to difficulties of proof, and so that "two mean-mad women" wouldn't be in court at the same time and the same place.

(3) Failure of Vera and her counsel to seek rescission notwithstanding knowledge of the affidavit, and knowledge that the Tax Commission and Lucy were trying to settle the tax issue.

(4) The "undisclosed facts" were evidential only, and related to an ultimate fact that was at issue in the first action, ~~in issue in the lawsuit.~~

(5) Vera had not qualified as a creditor either by having her claim allowed or by reducing it to judgment.

(6) Vera had renounced any confidential relationship between her and Lucy by employing counsel and bringing an action in which she alleged that Lucy was a part of a fraudulent scheme and had received trans-

fers of property to aid and abet Dr. Callister in defrauding her.

In the final analysis, the history of the first action belies Vera's claim in the second. Although she says (R. 3) she was induced to execute the stipulation and release because of her reliance on Lucy's representations, the question of the "actual intent" of Dr. Callister had been decided against her in the pre-trial order; and she didn't even begin to negotiate for settlement until her chance of winning the suit had all but evaporated.

It's almost as reasonable to suppose that she anticipated the tax controversy and settled to mark time while her adversary developed evidence for her.

There was no fraud nor fraudulent concealment—and there is no right to relief.

Respectfully submitted,

Bryce E. Roe
FABIAN & CLENDENIN

800 Continental Bank Building
Salt Lake City, Utah

*Attorneys for Defendant and
Appellant*

APPENDIX "A"

James W. Beless, Jr.
Attorney at Law

914 Kearns Building
Salt Lake City 1, Utah

September 26, 1962

Mr. Bryce Roe
Attorney at Law
Continental Bank Building
Salt Lake City, Utah

Re: Vera T. Callister v.
Lucy C. Callister, et al

Dear Bry:

I have done a little figuring on death taxes in A. C. Callister's estate, using the \$202,000 taxable estate for both the Federal Estate Tax and the State Inheritance Tax. You might have Ralph Miller check me out on these.

With the stocks included in the \$202,000 as gifts in contemplation of death, and using the full marital deduction, I compute a Federal Tax of \$15,100. Likewise, in computing the State Inheritance Tax, with \$40,000 deduction for the joint tenancy property, I compute a tax of \$9,250. Thus, total death taxes of \$24,350.00.

If the stocks are *not* included in the taxable estate, the Federal taxable estate would be \$105,000, and there would be no Federal Estate Tax, using the marital deduction. The State Inheritance Tax would be \$1,250.00.

The savings in death taxes, if the stocks are not included as gifts in contemplation of death, this amounts to \$23,100.

It would appear to me that Mrs. Lucy Callister should seriously consider this tax saving, as she would save the difference between what she would pay Vera Callister and \$23,100.00.

Very truly yours,

James W. Beless, Jr.

JWB/b

APPENDIX "B"

AFFIDAVIT

STATE OF UTAH }
COUNTY OF SALT LAKE } ss.

LUCY CALLISTER, after being placed on oath, deposes and says:

That she is the widow of Dr. A. Cyril Callister, who died on the 9th day of February, 1961.

That during the period of time from March through November of 1959, Dr. Callister transferred certain stocks from his name to the ~~dependent's~~ *dependent's* name which stocks were listed on the inheritance tax report and appraisal under the title "Transfers made within three years of date of death";

That her husband told her that the transfers were made for the purpose of removing these stocks from his name and placing them beyond access of his former wife, Vera Callister, to whom the doctor owed certain monies for arrearages in an alimony judgment which she had against him;

That the doctor was very bitter about having to pay this alimony because he felt that his former wife had received more than her fair share of the property upon their divorce;

That the doctor considered himself to be in good health at least until June of 1960 and that he maintained his clinic, and a nurse until about this time and engaged in the practice of medicine;

And that on or about June of 1960 he retired from the medical practice and converted the clinic into a nursing home.

Lucy Callister

Subscribed and sworn to this 30th day of December, 1962.

Ralph H. Miller
Notary Public

Residing in Salt Lake County, Utah

My commission expires: 3-22-64.

II