Brigham Young University Law School
BYU Law Digital Commons

Utah Supreme Court Briefs (pre-1965)

1964

R. George Bradbury and Althea Bradbury v. Gordon L. Rasmussen and Y'ora Gene Rasmussen : Brief of Respondents

Utah Supreme Court

Follow this and additional works at: https://digitalcommons.law.byu.edu/uofu_sc1

 Part of the Law Commons

Original Brief submitted to the Utah Supreme Court; funding for digitization provided by the Institute of Museum and Library Services through the Library Services and Technology Act, administered by the Utah State Library, and sponsored by the S.J. Quinney Law Library; machine-generated OCR, may contain errors.
Arthur H. Nielsen; Attorneys for Appellants;
Dan S. Bushnell; Attorney for Respondents;

Recommended Citation
Brief of Respondent, *Bradbury v. Rasmussen*, No. 10055 (Utah Supreme Court, 1964).
https://digitalcommons.law.byu.edu/uofu_sc1/4484

This Brief of Respondent is brought to you for free and open access by BYU Law Digital Commons. It has been accepted for inclusion in Utah Supreme Court Briefs (pre-1965) by an authorized administrator of BYU Law Digital Commons. For more information, please contact hunterlawlibrary@byu.edu.

OCT 14 1964
LAW LIBRARY

IN THE SUPREME COURT
of the
STATE OF UTAH

FILED
JUL 9 - 1964
Clerk, Supreme Court, Utah

R. GEORGE BRADBURY, Administrator of the Estate of GEORGE R. BRADBURY, Deceased, and ALTHEA BRADBURY,

Plaintiffs and Respondents,

vs.

GORDON L. RASMUSSEN and Y'ORA GENE RASMUSSEN, his wife,

Defendants and Appellants.

Case No. 10055

BRIEF OF RESPONDENTS

Dan S. Bushnell
Bushnell and Beesley
Attorneys for Plaintiffs and Respondents
15 East 4th South
Salt Lake City, Utah

Arthur H. Nielsen
Attorney for Defendants and Appellants
Newhouse Building
Salt Lake City, Utah

Sponsored by the S.J. Quinney Law Library. Funding for digitization provided by the Institute of Museum and Library Services Library Services and Technology Act, administered by the Utah State Library.
Machine-generated OCR, may contain errors.

INDEX

AUTHORITIES CITED

CASES

Sponsored by the S.J. Quinney Law Library. Funding for digitization provided by the Institute of Museum and Library Services Library Services and Technology Act, administered by the Utah State Library.
Machine-generated OCR, may contain errors.

Page

Sponsored by the S.J. Quinney Law Library. Funding for digitization provided by the Institute of Museum and Library Services Library Services and Technology Act, administered by the Utah State Library.
Machine-generated OCR, may contain errors.

IN THE SUPREME COURT
of the
STATE OF UTAH

R. GEORGE BRADBURY, Administrator of the Estate of GEORGE R. BRADBURY, Deceased, and ALTHEA BRADBURY,

Plaintiffs and Respondents,

vs.

GORDON L. RASMUSSEN and YORA GENE RASMUSSEN, his wife,

Defendants and Appellants.

Case No. 10055

BRIEF OF RESPONDENTS

STATEMENT OF FACTS

The Statement of Facts contained in the Brief of Appellants is substantially accurate as far as it goes, although it tends to highlight the theory of Appellants. Also, two Findings of Facts are inserted out of context which again tends to emphasize the position of the Appellants.

Sponsored by the S.J. Quinney Law Library. Funding for digitization provided by the Institute of Museum and Library Services Library Services and Technology Act, administered by the Utah State Library.
Machine-generated OCR, may contain errors.

Briefly the facts are as follows:

1. The decedent, George R. Bradbury, at the time of the negotiations was an elderly man in excess of 83 years, with failing eyesight and other disabilities incident to age. Although his deposition was taken and became part of the evidence in the case he became deceased prior to the trial. Mrs. Bradbury was in excess of 73 years of age at all times material to the litigation.

2. The discussions, prior to the preparation and signing of the documents sought to be cancelled in this action, were always in light of a sale and purchase at the price of $300.00 per acre for the property.

3. All the terms of the transaction with reference to the leasing of the farm and paying half the proceeds, etc., were consistent with the understanding of the parties; the only difference being what the Respondents thought the documents they had signed was for a Contract of Sale rather than a Deed reserving a Life Estate.

4. The Court found that the deed, lease and transfer of the water stock was null and void and should be rescinded for the following reasons:

(a) A confidential relationship existed between the parties thereto.

(b) The plaintiff, Althea Bradbury, and her husband, George R. Bradbury, deceased, were elderly people, with infirmities incident to age.

(c) The Defendants represented the transaction as being one for the sale of the farm and water

Sponsored by the S.J. Quinney Law Library. Funding for digitization provided by the Institute of Museum and Library Services Library Services and Technology Act, administered by the Utah State Library.
Machine-generated OCR, may contain errors.

stock, when, in fact, the documents purported to make a gift of said property.

(d) The transferors at no time intended to make a gift of such property.

(e) The alleged transfer of the above mentioned property was made subject to a mistake of fact on the part of Plaintiffs as to the nature of the transaction and the transfers involved.

(f) The Plaintiffs were of the opinion and understanding that said transactions were for the purpose of consummating the negotiations for the sale of the property.

(g) That the transferors did not have the benefit of independent advice in connection with said transaction.

(h) By virtue of the alleged transfers of the property mentioned above, the transferors had substantially disinherited their natural born heir, being their only son, R. George Bradbury.

(i) The Defendants failed to prove by clear and convincing evidence that the alleged gifts were fair, equitable, valid and free from any fraud or undue influence arising from the faith and trust reposed in them because of the confidential relationship. (52-3).

5. The Court stated that the primary issue for determination was whether the Respondents intended a sale or gift of the property. The Respondents testified

Sponsored by the S.J. Quinney Law Library. Funding for digitization provided by the Institute of Museum and Library Services Library Services and Technology Act, administered by the Utah State Library.
Machine-generated OCR, may contain errors.

that they did not understand the true nature of the transaction as represented by the documents signed by them, but rather they thought they were signing contracts for the sale of the property to be paid out of one-half of the proceeds realized from the operation of the farm. They did not find out the true nature of the transaction until after a bank appraiser came to the home for the purpose of examining property reported to him to be owned by the Appellants.

The argument of the points raised by the Appellants will require further consideration of the evidence which will show that Mrs. Rasmussen knew she would not by law receive any inheritance; that she had been told by the natural heir that if she were left anything he would fight to take it away; that to implement a predisposition to acquire the farm Mr. Rasmussen quit his job more than one year prior to the transaction for the admitted purpose that it would be easier to quit a job to take over the farm than to terminate a business; that in the meeting with Mr. Olson the Appellants were the dominant parties indicating the type of terms which would be acceptable to them but never mentioning that the prior discussions had always been in the form of a negotiated sale; that after the transaction the Appellants were apprehensive of sustaining their position and scrupulously attempted to fortify the same by issuing a One Dollar check marked "Paid in Full"; that the Appellants had the stock certificates transferred without requesting the execution of the certificates themselves and the new certificates were issued in the names

Sponsored by the S.J. Quinney Law Library. Funding for digitization provided by the Institute of Museum and Library Services Library Services and Technology Act, administered by the Utah State Library.
Machine-generated OCR, may contain errors.

of the Appellants without any reservation of the life estate. Further development of these facts and other related facts, which more than amply sustain the decision of the Trial Court, will be made in the argument hereinafter.

ARGUMENT

POINT I

THE COURT PROPERLY DETERMINED THAT THERE WAS A CONFIDENTIAL RELATIONSHIP EXISTING BETWEEN THE PARTIES AND THEREFORE THE RESPONDENTS HAD THE BURDEN OF PROVING THE FAIRNESS OF THE TRANSACTION.

POINT II

THE COURT PROPERLY CONCLUDED THAT AS A RESULT OF THE CONFIDENTIAL RELATIONSHIP THE APPELLANTS EXERTED UNDUE INFLUENCE UPON THE RESPONDENTS.

POINT III

THE MOVING TO THE FARM BY THE APPELLANTS MAY HAVE BEEN AN INDUCEMENT FOR THE REDUCTION OF THE SALES PRICE BUT IT WAS NOT THE

Sponsored by the S.J. Quinney Law Library. Funding for digitization provided by the Institute of Museum and Library Services Library Services and Technology Act, administered by the Utah State Library.
Machine-generated OCR, may contain errors.

CONSIDERATION FOR THE TRANSACTION.

POINT IV

APPELLANTS WERE NOT ENTITLED TO A JURY TRIAL.

POINT I

THE COURT PROPERLY DETERMINED THAT THERE WAS A CONFIDENTIAL RELATIONSHIP EXISTING BETWEEN THE PARTIES AND THEREFORE THE RESPONDENTS HAD THE BURDEN OF PROVING THE FAIRNESS OF THE TRANSACTION.

The Appellants in their Brief on Page 10, after referring to the determination that there was a "confidential relationship", stated:

> "However, the only evidence to sustain this determination was the fact that the Bradburys treated Y'Ora Rasmussen as their daughter and she loved and respected them as her parents."

This statement is grossly inaccurate. In fact, it is surprising that the contention is now made at all since in the depositions and in the trial this point was practically conceded by the Appellants. The evidence in addition to the fact that the Respondents treated Y'Ora Rasmussen as their daughter comes from admissions by counsel for the Appellants as well as state-

Sponsored by the S.J. Quinney Law Library. Funding for digitization provided by the Institute of Museum and Library Services Library Services and Technology Act, administered by the Utah State Library.
Machine-generated OCR, may contain errors.

ments from the Appellants themselves. Gordon Rasmussen, on two separate occasions in his deposition admitted that a relationship of confidence and trust existed between the parties hereto. He stated:

> Q. Do you think they had a confidence and trust in you?
>
> A. I am sure they did. (Deposition, Page 7).
>
> Q. Would you say at this time that you still had a good close relationship with your in-laws?
>
> A. Very good.
>
> Q. Would you say at this time that they had no reason to doubt you in any way; they placed confidence upon you and your wife?
>
> A. I say that they don't to this day have reason to have any doubt about us, other than just a family feud that has been brought up by means that has been previously talked of.
>
> Q. At any rate, the answer to my question, then, is that you did have a good, close relationship and that they would rely on what you say and accept your word for any transaction?
>
> A. They have no reason not to.
>
> Q. Just answer my question directly.
>
> A. Yes. (Deposition, page 21).

When this issue first came up during the trial, Mr. Nielsen, counsel for the Appellants, stated:

> "There is no dispute about the fact that there was a confidential relationship." (R. 78).

Thereafter counsel attempted to equivocate from the position taken. Nevertheless there is more than ade-

Sponsored by the S.J. Quinney Law Library. Funding for digitization provided by the Institute of Museum and Library Services Library Services and Technology Act, administered by the Utah State Library.
Machine-generated OCR, may contain errors.

quate evidence affirming the court's determination that such a relationship existed and there is no evidence in the record attempting to rebut such proof.

At the trial Gordon Rasmussen was called by the Respondents for the specific purpose of testifying concerning such matter. He testified that the Respondents reposed trust and confidence in him and his wife at the time of the negotiations and signing of the deed, one month later when the check for one dollar was issued, and approximately one year later, which would cover the time that the water stock certificates were reissued. His testimony was as follows:

> A. Now do I understand the question—Do I feel that the Bradburys had trust and confidence in me?
>
> Q. Right.
>
> A. Yes, they did.
>
> Q. Did the same situation exist, say one month after the papers were signed?
>
> A. Yes.
>
> Q. Would you say that the situation existed approximately one year after the papers were signed, or more specifically at or near the time that the water certificates were transferred?
>
> A. Yes. (R. 190).

Mrs. Bradbury testified concerning this issue as follows:

Sponsored by the S.J. Quinney Law Library. Funding for digitization provided by the Institute of Museum and Library Services Library Services and Technology Act, administered by the Utah State Library.
Machine-generated OCR, may contain errors.

Q. Did you at all times treat Y'Ora as if she was your natural born daughter?

A. I sure did.

Q. Did you have a close relationship with her?

A. Well, just like a mother would. I did everything for her.

Q. Did you have a lot of respect and confidence in her, and in her husband both?

A. Yes.

Q. I am talking about up to the time when we had this present difficulty, but up until that time, did you repose trust and confidence in the defendants?

A. I sure did. I trusted them.

Q. Did Mr. Bradbury have the same feelings toward them?

A. Yes, he trusted them. (R. 74).

There is no evidence in the record even attempting to refute the foregoing testimony. In view of the foregoing it is difficult to comprehend on what basis the statement is made in Appellant's Brief that "the only evidence to sustain this determination was the fact that the Bradburys treated Y'Ora Rasmussen as their daughter and she loved and respected them as her parents." The balance of the argument submitted by the Appellants after such statement consists of quotations from cases to the effect that the mere relationship of parent and child does not in and of itself create a presumption of a confidential relationship. Such cases are

Sponsored by the S.J. Quinney Law Library. Funding for digitization provided by the Institute of Museum and Library Services Library Services and Technology Act, administered by the Utah State Library.
Machine-generated OCR, may contain errors.

completely inapplicable since the evidence reviewed above shows that there was affirmative evidence showing something more than the relationship of parent and child to substantiate the determination made by the Court. In fact the record would sustain a decision that there had been a stipulation by counsel for the Appellants that a confidential relationship did exist.

The Trial Court expressed no doubt concerning this issue. In its memorandum decision the following statements were made:

> . . . the evidence is clear that during these negotiations between the parties there was a close confidential relationship. (R. 31).
>
> The defendants in this cause had a close and confidential relationship with plaintiffs * * * . (R. 33).

In view of the record there is more than adequate substantial evidence to support the court's determination. The cases cited by the Appellants are not applicable.

POINT II

THE COURT PROPERLY CONCLUDED THAT AS A RESULT OF THE CONFIDENTIAL RELATIONSHIP THE APPELLANTS EXERTED UNDUE INFLUENCE UPON THE RESPONDENTS.

The Appellants in their contention under this point assume that the Trial Court was required to find specific

Sponsored by the S.J. Quinney Law Library. Funding for digitization provided by the Institute of Museum and Library Services Library Services and Technology Act, administered by the Utah State Library.
Machine-generated OCR, may contain errors.

acts and conduct constituting undue influence. Such is not the law. Rather, the Courts have held that where a confidential relationship exists the burden shifts to the donee to show the absolute fairness and validity of the gift and that it is free from the taint of undue influence. If the donee fails to sustain that burden of proof the court is authorized to find that the gift is void, "through undue influence, without proof of specific acts and conduct of the donee." In 24 American Jurisprudence, Gifts, Sec. 49, P. 756, 757, it is stated:

> * * * It has also been held that if, at the time of a gift, the donor's mind was enfeebled by age and disease, even though not to the extent of producing mental unsoundness, and the donor acted without independent advice, such gift being of a large portion of all of the donor's estate and operating substantially to deprive those having the natural claim to the donor's bounty of all benefit from the donor's estate, *these circumstances, if proved and unexplained, will authorize a finding that the gift is void, through undue influence, without proof of specific acts and conduct of the donee* . . . (Emphasis added).

Again in 24 American Jurisprudence, Gifts, Sec. 116, page 791, it is stated:

> It has been held that where a confidential relationship exists between the donor and the donee at the time of the gift, it is generally considered to be presumptively void, and the burden of proof is on the donee to show the absolute fairness and vilidity of the gift, and that it is free from the taint of undue influence. This rule is the same at law as in equity. * * *

Sponsored by the S.J. Quinney Law Library. Funding for digitization provided by the Institute of Museum and Library Services Library Services and Technology Act, administered by the Utah State Library.
Machine-generated OCR, may contain errors.

Moreover, where there is a fiduciary relationship or a relationship of trust and confidence between a parent and child, then a presumption arises against the gift.

In an annotation in 63 A.L.R. 2d 294, Sec. 13 entitled Evidence: Burden of Proof; Presumptions, it is stated:

> "It is generally agreed that to establish a gift of a debt to the debtor, the burden of proof rests upon the party alleging the fact, and that the evidence for such purpose must be clear and convincing. This requirement is especially applicable where the claim is not asserted until after the death of the creditor. There is no presumption, however, in such case that testimony of the debtor tending to show a gift is false.
>
> "Where it appears that a confidential relationship existed between the parties, the debtor occupying the dominant or more influential position, the court will scrutinize the evidence with great care. It has even been held that in such case a gift of the debt will be presumed, prima facie, to have been obtained by constructive fraud on the part of the debtor." (P. 294).

The Utah cases are consistent with the foregoing general statements of the law. In Petersen vs. Budge, 102 P. 211, 35 Utah 596 (1909), the Court recognized these well established rules involving gifts to persons in fiduciary relationships. It stated as follows:

> "There is no rule of law more firmly established than that which holds that transactions between persons occupying fiduciary or confidential relations with each other, in which the stronger or

Sponsored by the S.J. Quinney Law Library. Funding for digitization provided by the Institute of Museum and Library Services Library Services and Technology Act, administered by the Utah State Library.
Machine-generated OCR, may contain errors.

superior party obtained an advantage over the other, cannot be upheld. * * *

"And the rule is well settled that in actions of this kind, where these confidential relations are known to exist, the burden of proof is cast upon the superior party to establish the perfect fairness, adequacy of consideration, and equity of the transaction."

In Smith, Law of Fraud, Sec. 190, the author says:

"The law is jealous, and public policy sanctions that transactions between persons occupying these relations shall receive the most careful scrutiny, and the burden of proof is shifted so as to require the beneficiary to establish the validity of bequests, gifts or grant."

In the case of Jones vs. Cook, 223 P2d 423, 118 Utah 562 (1950), the Court stated:

"There is no presumption in favor of a gift inter vivos. One who asserts title by gift inter vivos has the burden of proving that a gift was made, including the existence of all of the elements essential to its validity. 23 Am. Jur. P 790; Spencer vs. Barlow, 319 Mo. 835, 5 S.W. 2d 28. The rule is that "a clear and unmistakable intention on the part of a donor to make a gift of his property is an essential requisite of a gift inter vivos." 38.C.J.S. Gifts, Sec. 15 P 790. This court held in Christensen v. Ogden State Bank, 75 Utah 478, 286 P 638, and Holman v. Deseret Savings Bank, et al., 42 Utah 340, 124 P 765, that proof that decedent intended title to pass to the claimant during the lifetime of decedent, must be clear and convincing. In Raleigh v. Wells, 29 Utah, 217, 81 P. 908, 910, this court

Sponsored by the S.J. Quinney Law Library. Funding for digitization provided by the Institute of Museum and Library Services Library Services and Technology Act, administered by the Utah State Library.
Machine-generated OCR, may contain errors.

also declared that "Courts watch gifts, inter vivos with caution, especially where, as here, their enforcement would result in an inequitable distribution of the decedent's property." (223 P 2d 423, 425, 426).

In Jardine vs. Archibald, 279 P 2d 454, 3 Utah 2d 88 (1955), the court again discussed the rules of law applicable to cases of this nature. In so doing it stated as follows:

> "However, since the court found as a fact that a confidential relationship existed between the decedent and the donees, and since the evidence clearly sustained such finding, the question of whether such donees had sustained their burden of proving lack of fraud or undue influence is more difficult of solution.
>
> " It is well settled that where a fiduciary or confidential relationship exists between the donor and donee, equity raises a presumption against the validity of such transactions and the burden is cast upon the donee to prove their validity and that there was no fraud or undue influence by proving affirmatively and by clear and convincing evidence compliance with equitable requisites. This is so because there is implied in every fiduciary or confidential relationship a superiority held by one of the parties over the other. See Pomeroy's Equity Jurisprudence, 5th Ed. Vol. 3 Sec. 956, Page 790, 279 P 2d,. 454, 456. * * *
>
> "Of course, among the elements which might be of great importance, in most cases in determining alleged undue influence where a confidential relationship exists, is whether independent advice had been received by the donor and

Sponsored by the S.J. Quinney Law Library. Funding for digitization provided by the Institute of Museum and Library Services Library Services and Technology Act, administered by the Utah State Library.
Machine-generated OCR, may contain errors.

in some instances without such proof the donee might not be able to sustain his burden of proving good faith. Pomeroy's Equity Jurisprudence 5th Ed. Sec. 956 Pages 796-98, states the rule thus: * * *

The Supreme Court recognized and stated that in the cases of this nature the presumption of undue influence inferred from the relationship must be disproven by "clear and convincing evidence." In so doing the court quoted from an earlier case as follows:

> "In Greener vs. Greener 116 Utah 571, 212 P2d 195, in pages 204, 205, this court speaking through Mr. Justice Wolfe in defining what quandum of proof is needed to be clear and convincing, said:
>
> " * * * That proof is convincing which carries with it, not only the power to persuade the mind as to the probable truth or correctness of the fact it proports to prove, but has the element of clinching such truth or correctness. Clear and convincing proof clinches what might be otherwise probable to the mind. * * *
>
> "But for a matter to be clear and convincing to a particular mind it must at least have reached the point where there remains no seriousness or substantial doubt as to the correctness of the conclusion. * * * "

From the foregoing authorities it seems abundantly clear that the burden is not on the Respondents in this case to show specific acts of undue influence but rather, once the confidential relationship has been established the burden shifts to the Appellants to prove by clear

Sponsored by the S.J. Quinney Law Library. Funding for digitization provided by the Institute of Museum and Library Services Library Services and Technology Act, administered by the Utah State Library.
Machine-generated OCR, may contain errors.

and convincing evidence the perfect fairness, adequacy of consideration,and equity of the transaction.

The Court, in this case, however, did not just rely upon the failure of the Appellants to sustain the burden of proof that the transaction was fair and equitable. Rather, the Court, in its Memorendum Decision seemed impressed with the fact the Appellant had, in fact, exercised undue influence. The Court stated:

> "The proof, gathered from many sources, leaves the Chancellor with the fixed feeling that the Defendants were determined that this property must and would be placed beyond the reach of R. G. Bradbury, the only heir of Plaintiffs. There is an unending thread running throughout the offered proof that a sale of $300.00 per acre was discussed from the beginning of these negotiations until the eruption between the parties.
>
> * * *
>
> "The testimony, and the partial dependence of Defendants' cause is predicated on the feeling that Defendants were determined that the end result of their negotiations with Plaintiffs would vest in them the title to the premises as against R. G. Bradbury, the only legal heir." (R. 31-32).

The Court further stated:

> "The Defendants in this cause had a close and confidential relationship with Plaintiffs, prior to the rupture,—they visited rather frequently. Y'Ora Rasmussen surely knew that R. G. Bradbury, son of the Plaintiffs, had told her that if she were left anything by Plaintiffs, he would fight to defeat it. Moved by this feeling and this

Sponsored by the S.J. Quinney Law Library. Funding for digitization provided by the Institute of Museum and Library Services Library Services and Technology Act, administered by the Utah State Library.
Machine-generated OCR, may contain errors.

fear the inference follows that the deed, the lease and transfer of water stock was sought by Defendants to circumvent R. G.'s promise so made. The Defendants and R. G. Bradbury are well known as the principal actors in this controversy, while the Plaintiffs were non-combatants. This court is not concerned in this cause with the inside feud." (R. 33).

The Court then quotes some of the rules of law cited above.

The Court clearly recognized the issue to be determined. It stated:

> "There is no contention of Defendants that the Plaintiffs made a gift inter vivos or Causa Mortis, and none can be presumed. The single issue to be determined is: Did the Plaintiffs intend to convey practically all their property, some $50 to $60 thousand dollars in value, to the Defendants, and did they intend to disinherit their own flesh and blood in exchange for a life estate, a lease and the sum of $1.00?" (R. 33)

Some of the proof "gathered from many sources" which left "the Chancellor with a fixed feeling that the Defendants were determined that the property must and would be placed beyond the reach of R. G. Bradbury, the only heir of the Plaintiffs," is as follows:

1. MOTIVE

Mrs. Rasmussen testified that she knew she would not inherit as a legal heir (R. 317), and had been told by the son of the Plaintiffs that if she were left anything he would take it away from her. (R. 259, 327).

Sponsored by the S.J. Quinney Law Library. Funding for digitization provided by the Institute of Museum and Library Services Library Services and Technology Act, administered by the Utah State Library.
Machine-generated OCR, may contain errors.

Mr. Rasmussen testified that he was quite sure that the son would challenge the matter. (R. 393).

2. PRIOR DISCUSSIONS WERE ON THE BASIS OF A SALE AT $300.00 AN ACRE TO BE PAID OUT OF ONE-HALF OF THE PROCEEDS OF THE OPERATION.

The discussions commenced in the fall at the time of the deer hunt and continued through Thanksgiving, Christmas, anniversaries in January, and prior to going to Mr. Tex Olson's office around the First of February. Mrs. Bradbury testified concerning the fact that the offer had been made by a third person to purchase the farm at $400.00 an acre but that they would be willing to sell it to the Defendants for $300.00. (R. 75). Mrs. Rasmussen admitted that there had been such a conversation. (R. 270).

Mr. Rasmussen testified that a sale at $300.00 an acre was discussed at the time of the deer hunt (R. 356), and on another occasion in his home in Orem. (R. 385-7). Mrs. Rasmussen, after discussing the various conversations, admitted that she had testified in her deposition as follows:

> Q. Is it fair to say from these conversations that you and your husband and father and mother had tentatively come to an agreement of a value of $300.00 an acre?
>
> A. Yes, I suppose so. (R. 306).

The Court attached to its Memorandum Decision excerpts of testimony concerning the various discussions

Sponsored by the S.J. Quinney Law Library. Funding for digitization provided by the Institute of Museum and Library Services Library Services and Technology Act, administered by the Utah State Library.
Machine-generated OCR, may contain errors.

involving the negotiations for the sale at $300.00 per acre and the payment of one-half of the proceeds on the purchase price. (R. 35-38). Mrs. Rasmussen further admitted that she had previously testified in her deposition as follows:

> Q. What did you and your husband say about buying the farm?
>
> A. Well, we told them that we would buy it if there was some satisfactory way that it could be worked out for them and for us both.

to which was added after the taking of the deposition "So it would be ours when they died." (R. 305). She further admitted that she had testified in her deposition concerning the terms of payments as follows:

> Q. In this meeting was there anything said about the value per acre again?
>
> A. I think $300.00 an acre was mentioned. But I am not sure.
>
> Q. Was anything said about terms of payment at that meeting?
>
> A. They were to have half of the profit after the expenses were paid on the farm.
>
> Q. So that, in essence, the contract was going to be paid out of the proceeds from the farm; is that right?
>
> A. That is right. (R. 307).

Sponsored by the S.J. Quinney Law Library. Funding for digitization provided by the Institute of Museum and Library Services Library Services and Technology Act, administered by the Utah State Library.
Machine-generated OCR, may contain errors.

3. DISCUSSIONS IN ATTORNEY OLSON'S OFFICE, DOMINATED BY DEFENDANTS, STUDIOUSLY ELIMINATED ANY REFERENCE TO PRIOR NEGOTIATIONS FOR A SALE.

Mr. Rasmussen was the one who called Mr. Olson and made the appointment and told him that the Bradburys wanted to turn the farm over to the Defendants. (R. 390). Mr. Rasemussen further stated that in the discussion he told Mr. Olson that the Bradburys had offered the Defendants the farm and they needed legal advice on how it could be arranged so that the farm would be the Defendants' when the Plaintiffs died. (R. 359-360). The witness admitted, however, that there was no mention made to Mr. Olson concerning a sale at $300.00 an acre. (R. 388). Mrs. Rasmussen likewise testified that the sum of $300.00 was not discussed with Mr. Olson (R. 309-10). Mr. Olson likewise testified that there was no discussion with him about a purchase or sale or the price of $300.00 per acre. (R. 402).

4. THE POSITION OF THE APPELLANTS THAT THEY WERE TO HAVE THE PROPERTY WHEN THE RESPONDENTS DIED, HOWEVER, WAS REPEATEDLY EMPHASIZED IN THE DISCUSSIONS WITH MR. OLSON.

The Defendants admitted that they made it clear and emphasized to Mr. Olson the fact that when the

Sponsored by the S.J. Quinney Law Library. Funding for digitization provided by the Institute of Museum and Library Services Library Services and Technology Act, administered by the Utah State Library.
Machine-generated OCR, may contain errors.

Bradbury's died the property would be theirs. (R. 394, 318). Concerning this subject Mr. Rasmussen testified as follows:

> Q. Is it fair to say, then, that the things that were discussed in Mr. Olson's office was because you wanted to be protected, is that true?
>
> A. That is true.
>
> Q. "We wanted the property when Mr. and Mrs. Bradbury died?"
>
> A. Yes.
>
> Q. And that we would pay 50% from operating the farm until that time?
>
> A. That was on the life estate.
>
> Q. Right. But during the life estate you would operate the farm and give them half the proceeds?
>
> A. That is right.
>
> Q. But you did not mention that you were purchasing it or intending to purchase it, or that you would pay a value of $300.00 an acre?
>
> A. No, we didn't. (R. 319).

Mr. Olson was obviously misled since there was no discussion concerning a sale. He testified that Mr. Rasmussen explained to him that the Rasmussens would come and run the farm and that they wanted to be secure in taking over the farm and "know that the farm wouldn't go to anyone else after the death of Mr.

Sponsored by the S.J. Quinney Law Library. Funding for digitization provided by the Institute of Museum and Library Services Library Services and Technology Act, administered by the Utah State Library.
Machine-generated OCR, may contain errors.

and Mrs. Bradbury." (R. 235). A will was discussed but it was rejected by the Rasmussens since Mr. Olson explained that it could be changed. (R. 236). Mr. Olson further testified that the Rasmussens were definite and positive as to the arrangement which they wanted with reference to their owning the property after the death of the Bradburys and that the Bradburys were vague and indefinite as to the mechanics as to how the matter should be handled. (R. 248). Mr. Olson further testified that as to the transaction involving the transfer of the water stock he dealt exclusively with Mr. Rasmussen. (R. 249).

5. THE PLAINTIFFS DID NOT UNDERSTAND THE NATURE OF THE TRANSACTION, BUT RATHER THOUGHT THEY HAD MADE A SALE.

Both of the Plaintiffs testified that they thought they were signing a contract for the sale of the farm at $300.00 an acre to be paid from one-half of the proceeds of the operation of the farm. (R. 85, 213). Both further testified that Mr. Olson, in reading the documents read them so fast that they couldn't understand them. (R. 84, 219). Two independent witnesses testified that after the Rasmussens had commenced operating the farm they had a conversation with the Plaintiffs wherein the statement was made that arrangements were being made so that the Defendants could buy the farm. (R. 181, 186, 405).

Sponsored by the S.J. Quinney Law Library. Funding for digitization provided by the Institute of Museum and Library Services Library Services and Technology Act, administered by the Utah State Library.
Machine-generated OCR, may contain errors.

6. THE SCRUPULOUS CONDUCT OF THE DEFENDANTS AFTER THE SALE WAS SO SUPER-TECHNICAL THAT IT INDICATES GUILTY APPREHENSIONS.

When Mr. Rasmussen first came down to operate the farm he specifically went to see Mr. Olson to see that everything was completed. (R. 391, 393). Approximately one month after the transaction the Defendants on their own initiative gave to Mrs. Bradbury a check for $1.00, on which was the notation "Payment in Full." At the time it was given to Mrs. Bradbury, Mr. Rasmussen told her that it was part of our deal, "that went along with the deal, and that Gordon would be moving down on the farm, and that it was called for in the contract, and that we wanted to live up to the contract." (R. 282). However, Mrs. Rasmussen didn't call to her mother's attention the fact that the notation about payment in full had been placed on the check. (R. 325). Mrs. Bradbury testified that she didn't know what the One Dollar check was payment for and did not notice that it had a notation thereon regarding the payment in full. (R. 159).

Mrs. Rasmussen further testified that the contract had been read by her three or four or several times. (R. 329).

The water stock was likewise transferred approximately ten months after the initial transaction upon the initiative of the Defendants and by use of Assignments rather than requesting the Plaintiffs to endorse

Sponsored by the S.J. Quinney Law Library. Funding for digitization provided by the Institute of Museum and Library Services Library Services and Technology Act, administered by the Utah State Library.
Machine-generated OCR, may contain errors.

the certificates themselves. (R. 210). The new certificates did not reserve the life estate in the Plaintiffs. (R. 398-9).

7. MRS. RASMUSSEN'S SUBSEQUENT CONDUCT DEMONSTRATES CHARACTER CAPABLE OF EXERCISING UNDUE INFLUENCE.

Mrs. Bradbury testified that after the true nature of the transaction became known to the Plaintiffs she had a conversation with Mrs. Rasmussen in her kitchen as follows:

> A. And I said, "Y'Ora, there must be some mistake or some misunderstanding about this." I said, "Let's get together and thresh it out and see what's the matter," and she just wouldn't talk about it, and she said, "you get out of here". She ordered me out of the house and would not talk to me. (R. 410).

Mrs. Bradbury further testified to a second conversation as follows:

> A. I said, "Y'Ora, why did you do such a thing as that?", and she said, "I am not depriving my children of their needs for R. G.'s children,and I had to secure myself," she said. (R. 412).

The testimony of the Defendants with reference to various conversations and transactions in essence amounts to calling her parents liars. Mrs. Bradbury further testified:

Sponsored by the S.J. Quinney Law Library. Funding for digitization provided by the Institute of Museum and Library Services Library Services and Technology Act, administered by the Utah State Library.
Machine-generated OCR, may contain errors.

Q. Mrs. Bradbury, was Mr. Bradbury ill and more or less confined to his home during the last six weeks before he died?

A. Yes.

Q. During that period of time did Mrs. Rasmussen come into the house and see him?

A. Not the six weeks that he was sick.

Q. Did this have any effect upon him?

A. Mr. Bradbury, with tears in his eyes, said, "It does look to me like Y'Ora could come in and ask how I was."

Q. During this period of time did you also become confined because of an illness involving yourself?

A. Yes.

Q. And approximately how long did that last?

A. It was two weeks that I never walked across the house. * * *

Q. Did Y'Ora help you during that period of time?

A. No. She never even called. (R. 408).

The fact that a confidential relationship existed between the parties requires the Defendants to show by clear and convincing evidence that the transaction was compeltely fair and equitable in all respects. This the Appellants have failed to do. Rather, the transaction on its face shows the utter unfairness of the same. The natural born heir is disinherited and the opportuning Defendants stand to be the owners of a farm having a value of approximately $60,000.00 upon which they

Sponsored by the S.J. Quinney Law Library. Funding for digitization provided by the Institute of Museum and Library Services Library Services and Technology Act, administered by the Utah State Library.
Machine-generated OCR, may contain errors.

have been living and for which they have paid, according to their testimony, $200.00 from the operation of the farm. (R. 374).

The record rather than showing a rebuttal of the presumption of undue influence arising from the confidential relationship, shows to the contrary deliberate intentional conduct on the part of the Defendants amounting to undue influence and a violation of the confidence and trust reposed in them by the Plaintiffs.

POINT III

THE MOVING TO THE FARM BY THE APPELLANTS MAY HAVE BEEN AN INDUCEMENT FOR THE REDUCTION OF THE SALES PRICE BUT IT WAS NOT THE CONSIDERATION FOR THE TRANSACTION.

The Appellants in their argument of Point III presuppose that the consideration for the conveying of the property and water stock was the moving of the Appellants to the farm. Counsel for the Appellants then proceed to argue and cite cases to establish that such consideration would be adequate to support the transfers. The basic assumption is invalid that the Appellants moving to the farm was the consideration. The Court held to the contrary.

The Appellant filed a motion to alter and amend the Findings of Fact and proposed to the Court that it adopt the following Finding of Fact:

Sponsored by the S.J. Quinney Law Library. Funding for digitization provided by the Institute of Museum and Library Services Library Services and Technology Act, administered by the Utah State Library.
Machine-generated OCR, may contain errors.

(c) *That Defendants gave up their home in Orem, Utah, and moved to Sevier County and took over the operation of the farm,* all of which was done in consideration of the transfer of said property by the Bradburys to the Defendants in such manner that said Defendants would have the title to said property upon the death of the said Bradburys. (Italics added). (R. 45).

The Court agreed to have inserted in the amended Findings of Fact the part of the above quotation which has been italicized. The balance of the quotation was rejected by the Court.

There is no question but what the Respondents naturally desired to have the companionship of the Appellants and their children. Such desires could only be considered under the facts of this case to be the inducement for the transaction at a reduced price and not the negotiated and bargained for consideration. As cited above, conversations were related wherein the Respondents stated that they had an opportunity to sell the farm for $400.00 an acre but would be willing to sell it to the Appellants for $300.00 an acre. (R. 75, 270).

The Appellants cite no evidence to support a contention that moving to the farm was the consideration for the conveyance of the property and the water certificates. Rather, they merely quote the findings of the Court which merely recites the fact that the Respondents desired to have the association with the Appellants and that the Appellants did move to Sevier County. It

Sponsored by the S.J. Quinney Law Library. Funding for digitization provided by the Institute of Museum and Library Services Library Services and Technology Act, administered by the Utah State Library.
Machine-generated OCR, may contain errors.

is not logical or reasonable to then draw the inference that this conduct was the consideration for the transacton. As demonstrated above, the Court specifically and expressly rejected such a contention. The evidence reviewed above clearly demonstrates that all of the discussions and negotiations were on the basis of a sale at $300.00 per acre. The payment of this amount was to be the consideration for the transaction.

As to the Appellants quitting good jobs, etc., the testimony is that Mr. Rasmussen was having trouble with his feet in working on the concrete and had already terminated his business. (R. 75, 212, 321). Mrs. Rasmussen testified that she was working in Richfield and making about the same as she did in Provo. (R. 330).

Again the cases cited by the Appellants are inapplicable. The issue is not whether promises to move to the farm and take care of the elderly people is sufficient or adequate consideration to support a contract but rather there must first be a finding or some evidence that such a promise was made as consideration for a change of position. The Appellants have cited no evidence to support their contention. The evidence reviewed with reference to other points definitely refutes such a contention. Cases may hold that such a change of position can be adequate consideration but they must be based upon a different factual basis than the one presented in this case.

Sponsored by the S.J. Quinney Law Library. Funding for digitization provided by the Institute of Museum and Library Services Library Services and Technology Act, administered by the Utah State Library.
Machine-generated OCR, may contain errors.

POINT IV

APPELLANTS WERE NOT ENTITLED TO A JURY TRIAL.

It has been traditional in the State of Utah that the common law distinction between equity and law cases was retained with reference to the right to trial by jury. If the case is one in equity there is no right to a jury trial as a matter of right. The question as to whether an action is legal or equitable is discussed in some length in Petty vs. Clark, 102 Utah 186, 129 P 2d 568, 2nd Appeal, 113, Utah, 205, 192 P 2d 589.

Rule 39 (a) U.R.C.P. cited by the Appellants does not involve the basic right of jury trial but rather discusses the mechanics of designating upon the register of action those cases where a trial by jury has been demanded presuming that it was a proper case for a jury trial in the first instance. The Appellants then cite Section 78-21-1 U.C.A. 1953 as being applicable, apparently contending that this is an action for the recovery of specific real or personal property. To the contrary, this is clearly a case to cancel, rescind and annul a deed, a lease and a transfer of water certificates. This is the very relief granted by the Court. The Appellants as a first paradox rely on the fact that this was an equity case in citing to the Court on page 16 of their Brief authority to the effect that on an appeal in an equity case the review may be both as to law and fact. The second paradox is that the former attorney for the Respondents requested a jury trial and the

Sponsored by the S.J. Quinney Law Library. Funding for digitization provided by the Institute of Museum and Library Services Library Services and Technology Act, administered by the Utah State Library.
Machine-generated OCR, may contain errors.

counsel for Appellants objected to the same, maintaining that the Respondents were not entitled to a trial on the issues by the jury under the provisions of Sec. 78-21-1 U.C.A. 1953. At the Pre-Trial present counsel for Respondents admitted the case was an equity case and that the objection was well taken. At that time Counsel for the Appellants then reversed his position and indicated that he desired a jury trial. In the Appelpellant's Brief mention is made of the Pre-Trial proceedings although no record was made of the same. Also, the original of Appellant's objection to the demand for jury trial is not in the record and therefore has not been certified to the Supreme Court. Nevertheless, on the 15th day of March, 1962, under the signature of counsel for the Appellants the objection to the demand for jury trial was served upon John T. Vernieu and recited as follows:

> Defendants hereby object to the demand for jury trial filed herein by the plaintiffs upon the following grounds and for the following reasons:
>
> 1. Plaintiffs are not entitled to trial of the issues by a jury under the provisions of Sec. 78-21-1 U.C.A. 1953.
>
> 2. Timely demand for a jury trial was not made, as required by the provisions of Rule 38 (b) U.R.C.P.

The separate opinion in the case of Johnson vs. Johnson, 9 Utah 2d, 40, 337 P 2d 420, cited by the Appellants, would seem to indicate that an action to rescind conveyances of real property permits a jury

Sponsored by the S.J. Quinney Law Library. Funding for digitization provided by the Institute of Museum and Library Services Library Services and Technology Act, administered by the Utah State Library.
Machine-generated OCR, may contain errors.

trial under Sec. 78-21-1 U.C.A. However, the main opinion under the case holds to the contrary. The case is very analogous to the present case. It involved an action to cancel and rescind conveyances of real estate procured by a son from a father where a confidential relationship existed. The Court in the Johnson case stated:

> "In assaying the sufficiency of the proof, the Plaintiff here has significant help in the rule that where a confidential relationship is shown to exist and a gift or conveyance is made to a party in a superior position, a presumption arises that the transaction is unfair.[1] The presumption has the form of evidence and will itself support a finding if not overcome by countervailing evidence. Therefore the burden was on the defendant, Calvin Johnson, to convince the Court by a preponderance of the evidence that the transaction was fair.[2] If he failed to do so, the finding to the contrary was justified,and it will not be disturbed on appeal unless the contrary evidence was so clear and persuasive that all reasonable minds would so find." (337 P. 2d 420, 442.)

The Court further stated:

> "The trial Court properly regarded the proceedings as in essence an action in equity to declare void instruments by which Calvin Johnson proported to obtain his father's property. * * * Due to the nature of the action it was within the prerogative of the Court to refuse a request for a jury!" (337 P.2d, 420, 424).

---

[1] Omega Investment Company vs. Wooley, 72 Utah 424, 271 P 797, quoting 2 Pomeroy Equity Jurisprudence, Sec. 596.
[2] In re Swan's Estate, 4 Utah 2d, 277, 293 P 2d, 682.

Sponsored by the S.J. Quinney Law Library. Funding for digitization provided by the Institute of Museum and Library Services Library Services and Technology Act, administered by the Utah State Library.
Machine-generated OCR, may contain errors.

Prior to the Pre-Trial the Appellants contended that this was an equity case. In their Brief on appeal before this Court they are still maintaining that this is an equity case. The Johnson case cited by the Appellants holds that a suit to rescind and cancel written documents is an equity case and that the trial court properly deny a jury trial in such a case.

CONCLUSION

The Appellants prior to the trial and at the time of the trial did not contest but in fact stipulated at one point that a confidential relationship existed. There was no evidence introduced to refute or rebut such a determination of the Trial Court. A confidential relationship having been established, the Court properly concluded that the Appellants had exerted undue influence. This finding may be supported either upon a failure of the Appellants to rebut the presumption, or by actual specific evidence to the effect that the Appellants specifically took advantage of the confidence and trust reposed in them.

The other findings of the Court in addition to the determination of undue influence equally support the judgment declaring the transfers to be null and void. More particularly, they establish that there was no intent to make a gift; that the transaction was misrepresented; and that there was a mistake of fact on the part of the Respondents, knowledge of which was in the possession of the Appellants.

Sponsored by the S.J. Quinney Law Library. Funding for digitization provided by the Institute of Museum and Library Services Library Services and Technology Act, administered by the Utah State Library.
Machine-generated OCR, may contain errors.

The Appellants erroneously suggest that the consideration for the transaction was their moving to Sevier County, which is contrary to the specific action of the Court rejecting such contention.

Finally, the Appellants should not be permitted to inconsistently object to a demand for jury trial prior to the trial of the matter urging that the case is an equity case and to also urge that the case be reviewed as an equity case and then in a complete reversal maintain to this Court that they were erroneously denied the right to a jury trial.

The Trial Court studiously reviewed this case after the trial and has written a Memorandum Decision supported by excerpts of testimony. That Memorandum Decision clearly shows that there was no doubt in the Trial Court's mind concerning its decision on the issues in this case. Either under an equity review or the review of legal issues there is more than sufficient substantial evidence to sustain the Trial Court's determination.

Respectfully submitted,

Dan S. Bushnell
Bushnell & Beesley

Attorneys for Plaintiffs and Respondents

15 East 4th South
Salt Lake City, Utah

Sponsored by the S.J. Quinney Law Library. Funding for digitization provided by the Institute of Museum and Library Services Library Services and Technology Act, administered by the Utah State Library.
Machine-generated OCR, may contain errors.