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

Utah Supreme Court

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IN THE SUPREME COURT OF THE STATE OF UTAH

R. GEORGE BRADBURY, Administrator of the Estate of George R. Bradbury, deceased, and ALTHEA M BRADBURY,

Plaintiffs and Respondents,

— vs. —

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

Defendants and Appellants.

Case No. 10055

BRIEF OF APPELLANTS

Appeal From a Judgment of the District Court of Sevier County

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IN THE SUPREME COURT OF THE STATE OF UTAH

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STATEMENT OF THE CASE

This case involves an action by R. George Bradbury as Administrator of his father's estate, George R. Bradbury, deceased, and Althea Bradbury, surviving widow of George R. Bradbury, to cancel and annul a deed and conveyance of certain real property and water rights (represented by shares of stock in the Joseph Irrigation Company) from George R. Bradbury and Althea Bradbury

to the Defendants, in which the Grantors reserved a life estate to themselves and to the survivor of them, and to cancel and annul a farm lease agreement executed between the parties, whereby Defendants leased the farm and agreed to operate the same and pay to Grantors one-half the proceeds derived therefrom during such life estate.

DISPOSITION IN THE LOWER COURT

The case was tried by the Court without a jury, although demand for jury was made and not waived; and after rendering its Findings of Fact the Court determined as a sole conclusion of law that the Defendants "in their confidential relationship, exerted undue influence upon the transferors" thereby entitling Plaintiffs to a judgment declaring the deed and transfer of water stock, together with the farm lease agreement, to be null and void and rescinded.

RELIEF SOUGHT ON APPEAL

The trial court's decision in favor of Plaintiffs, as reported in its written decision, was based upon the erroneous determination that "a close and confiential relationship" existed between Plaintiffs and Defendants so that "the burden of proof is shifted so as to require" the Defendants to sustain the validity of the transfer of property and execution of the farm lease. (R. 33, 50)

As a result of placing the burden of proof upon the Defendants to prove the fairness of the transaction, the

court further erroneously concluded that "Defendants in their confidential relationship, exerted undue influence upon the Transferors." (R. 53)

This appeal is taken for the purpose of having this court determine: (1) That no "confidential relationship" existed between the Bradburys and Defendants as that term is considered in its legal significance so that Defendants did not have the burden of proving the fairness of the transaction; (2) That Plaintiffs failed to show by clear and convincing proof that the Defendants exerted "undue influence" upon the Bradburys in connection with the transaction; (3) That there was adequate consideration for the transfer of property and execution of the lease; and (4) that the case in any event should have been tried to a jury.

STATEMENT OF FACTS

George R. Bradbury, now deceased, and his wife Althea Bradbury (who has since remarried and is now Althea Washburn, but whom we will for convenience refer to as Mrs. Bradbury) lived in Joseph, Utah, where they owned, and in years past had operated, an irrigated farm with some additional grazing land. There are two small homes located side by side on a small lot. (R. 265) R. George Bradbury (one of the Plaintiffs, as Administrator of his father's estate) is the only child of Mr. and Mrs. George R. Bradbury. The Defendant, Yora, was raised by the Bradburys as their daughter although she in fact is a daughter of a niece who had also been raised

by them. (R. 74) Yora lived in the Bradbury home until she reached maturity and married and had been treated as though she were a child of the Bradburys. (R. 265) After she married and moved away she continued to visit with the Bradburys and they in turn visited with her on holidays or special events such as birthdays. Yora remembered her foster parents on such occasions as their birthday or Christmas and showed the normal feelings, love and attention to them that a natural child would have done.

For several years prior to the year 1960, the farm had been leased or rented to other individuals. (R. 101) At least on two different occasions the son, R. George Bradbury, had operated the farm (R. 269); but he had finally left in 1957 or 1958, apparently telling his father that he was going out and get a job and wouldn't have the property as a gift. (R. 262) Before their son operated it the last time, it had been leased to Leon Taylor for 3 or 4 years. (R. 101, 102) When R. George left the last time, it was rented to M. D. (Dewey) Foreman, a brother of Mrs. Bradbury. (R. 102) He operated the farm from 1957 through 1959 (R. 98, 433). Near the end of the 1959 season he advised the Bradburys that he was not going to operate the farm for them any longer and suggested they consider selling it, but they didn't want to. Mr. Bradbury had "acquired the property from hard labor and he didn't feel like he wanted to let loose of it." (R. 433)

Insofar as the record discloses, the first time the matter of Defendants acquiring the property was mentioned

was in October 1959. Mrs. Bradbury testified that when the Rasmussens were down for the deer hunt Mr. Bradbury said they had been talking about selling the farm and wanted $300.00 an acre for it, whereupon Mr. Rasmussen said he would think about it. (R. 75) Although Mr. and Mrs. Bradbury's testimony differs substantially from Mr. and Mrs. Rasmussen's there is no dispute that the matter of acquiring the farm and moving to Joseph, Utah, was first discussed in the fall of 1959 and that one or more discussions followed until all of the parties (Mr. and Mrs. Bradbury and Mr. and Mrs. Rasmussen) went to see an attorney, Tex R. Olsen, in Richfield about January 18, or February 1, 1960. (R. 76, 275) The court, in its Amended Findings of Facts, found:

> "9. That the said George R. Bradbury and Althea Bradbury were interested in having the Defendants move to Sevier County and live close to the Bradburys where they could have the companionship and association with Defendants and their children during their declining years. . . .
>
> "11. That prior to the preparation or execution of any documents in connection with the instant matter the parties met with an attorney, Tex R. Olsen, at Richfield, Utah, who counseled and advised the parties with respect to the proposed transaction." (R. 51)

The testimony of the Bradburys differs in many respects from the testimony of the Rasmussens as to what took place in Mr. Olsen's office. However, as will be pointed out hereinafter, Mr. Olsen corroborated Defendants' version of what happened. Mrs. Bradbury testified that Mr. Olsen asked Mr. Bradbury about the

farming ground and how much water there was. Mr. Bradbury told him 76 acres and how many shares of water he had. (R. 83)

Although Mrs. Bradbury also testified the papers were signed that day in Mr. Olsen's office (R. 84) it appears conclusively that they were not. Mr. Bradbury testified in his deposition that they were in Mr. Olsen's office 3 times. (R. 159) The Bradburys and the Rasmussens drove to Mr. Olsen's office in separate cars (R. 83). When they left the office the Rasmussens went on back to Orem and the Bradburys drove back to Joseph (R. 279). Later Mr. and Mrs. Bradbury returned to Mr. Olsen's office with some tax notices on their property which were more legible than the ones they had taken the first day (R. 216, 217). Later the Bradburys returned to Mr. Olsen's office a third time where the papers were read to them by Mr. Olsen and were signed by them. (R. 130, 218) Both Mr. and Mrs. Bradbury testified that Mr. Olsen read the documents over to them but they claimed they didn't understand them. (R. 130, 219) Mrs. Bradbury testified they received a copy of the contract but not the deed. (R. 120)

The papers signed by the Bradburys in Mr. Olsen's office on February 18, 1960, consist of a warranty deed conveying their real estate to the Rasmussens, reserving a life estate to the grantors and the survivor of them (Exh. 1, R. 445, 446) and a Farm Lease Agreement whereby the Bradburys leased the same property to the Rasmussens for the term of the life of the survivor of Lessors "unless sooner terminated upon mutual agreement." (Exh. 2, R. 447-449)

The following day Mr. Olsen mailed the deed and 2 copies of the lease to the Rasmussens in Orem, Utah, with the request that if the lease appeared to be satisfactory to sign both copies and return the original (Exh. 9, R. 477). This they did. (R. 280) About March 1, 1960, as the Rasmussens were traveling through Joseph, Utah, on a trip with some friends, they stopped and Mrs. Rasmussen gave Mrs. Bradbury a check for $1.00 as mentioned in the deed. (Exh. 7, R. 475) Mrs. Rasmussen testified that Mr. Bradbury was present and that she stated to the Bradburys she was giving them the check because it was part of the deal. (R. 282)

Shortly thereafter Mr. Rasmussen moved down to Joseph and took over the farm. He lived with the Bradburys until his family moved down after school let out in the spring. Shortly after he arrived on the farm Mrs. Bradbury wrote to Mrs. Rasmussen telling what Gordon was doing. (Exh. 6, R. 474) The Rasmussens both gave up jobs and sold their home in Orem to move down on the farm and operate it and live near the Bradburys as agreed. (R. 282, 283)

Later the Bradburys gave Gordon the three certificates of water stock which were taken to the secretary of the Company, along with separate assignments executed by the Bradburys, and a new certificate was issued to the Rasmussens. The certificate was returned to the Bradburys and held by them. (Exhs. 10, 11, 12, 14, R. 479, 90, 91, 221, 364-368)

Everything apparently went smoothly for some time (R. 284, 437). Gordon Rasmussen worked hard on the

farm; and Mr. Bradbury helped him financially to buy cattle. (R. 369) Mr. Bradbury testified that the operation had been as good as it could be. (R. 229) However, after Mrs. Bradbury made a trip to Salt Lake City with their son George in the spring of 1961, she came home and told the Rasmussens that things would have to be changed because the son would not stand for the deal. This is according to the testimony of the Rasmussens. (R. 192, 285). Mrs. Bradbury testified the break came when a man from a bank came to the place in August, 1961, to check on the property at which time she and Mr. Bradbury looked the papers over and saw what had happened. (R. 88) However, her own brother, M. D. Foreman testified that in the spring of 1961 "all at once the devil jumped up and they were at each other's throats." (R. 437) In July, 1961, he drove the Bradburys to St. George to see their son and as he picked them up to bring them back their son told them to fight it all the way to get the property back. (R. 439)

The Bradburys contacted Mr. John Vernieu, an attorney, of Richfield, who filed suit to rescind the deed and water certificate but not the lease, and asked for an accounting of the amount due under the lease. (R. 1-11) Later, an amendment was filed (R. 12-13) and a jury trial demanded. (R. 16) Following the taking of the depositions of Mr. and Mrs. Bradbury by Defendants, Mr. Vernieu withdrew. (R. 17) After Mr. Bradbury passed away, other counsel was obtained and a new amended complaint was filed seeking to cancel and rescind not only the deed and water stock but also the lease agreement. (R. 22-24)

During the pendency of the action, the Rasmussens continued to live next to the Bradburys, operated the farm, and gave assistance and help to the Bradburys as opportunity arose. (R. 363)

There are many additional items of fact not related above — some of which are in dispute — but further reference thereto will be made in subsequent portions of this brief. At the time of the occurrence of the events leading up to and the signing of the documents in question Mr. Bradbury was over 83 years of age and under the findings of the court "with ailing eyesight and disabilities incident to age." Mrs. Bradbury was 73 years of age. (R. 50)

ARGUMENT

POINT I

THE COURT ERRED IN DETERMINING A "CONFIDENTIAL RELATIONSHIP" EXISTED BETWEEN THE BRADBURYS AND DEFENDANTS AND THAT DEFENDANTS HAD THE BURDEN OF PROVING THE FAIRNESS OF THE TRANSACTION.

One of the major arguments of counsel for Plaintiffs during the trial was that there was a "confidential relationship" between the Bradburys and the Rasmussens which placed the burden on Defendants to prove the fairness of the transaction between the parties. The trial court determined that a confidential relationship did exist which cast the burden on the Defendants "to establish the perfect fairness, adequacy of consideration, and

equity of the transaction." (R. 33) However, the only evidence to sustain this determination was the fact that the Bradburys treated Yora Rasmussen as their daughter and she loved and respected them as her parents. This Court has heretofore held that the relationship of parent and child is not sufficient to create a "confidential relationship" requiring proof of fairness of the transaction. In the case of *Hatch* v. *Hatch,* 46 U. 218, 148 P. 433, where decedent had made a conveyance to his son at the instigation of the Mother, the court held, after discussing many cases on the subject:

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

This same doctrine was again pronounced in the case of *Froyd* v. *Barnhurst,* 83 U. 271, 28 P. 2d 135. We quote:

> "Appellants apparently place the burden of their argument upon the proposition that there was a confidential relationship existing between defendant and her mother, Mrs. Sandin, and therefore this case is controlled by the rule that, where such confidential relationship exists between grantor and grantee, the burden is upon the grantee

to show the transaction to be fair and free from fraud and undue influence. Appellant cites *Peterson* v. *Budge*, 35 Utah 596, 102 P. 211; *Birdsall* v. *Leavitt*, 32 Utah 136, 89 P. 397; *Toland* v. *Corey*, 6 Utah 392, 24 P. 190; *Omega Investment Co.* v. *Woolley*, 72 Utah 474, 271 P. 797; also *Paddock* v. *Pulsifer*, 43 Kan. 718, 23 P. 1049, 1051.

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

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

The evidence in the instant case is even weaker on the matter of confidential relationship than in the two cases above cited. The Rasmussens did not live with the Bradburys but only visited as children should with parents on special occasions. They had never had any busi-

ness transactions. Gordon Rasmussen had never operated the farm or engaged in any family business matters. Mr. Bradbury had always handled his own affairs. Although his son had prepared lease agreements for him (R. 98) there is no testimony that Gordon Rasmussen had ever discussed the operation of the farm prior to October, 1959.

In the *Hatch case,* supra, the court quotes with approval from the opinion of the Iowa Supreme Court in *Chidester* v. *Turnbull,* 117 Ia. 168, 90 N.W. 583, a particularly applicable statement, as follows:

> "Counsel for plaintiffs contend that the burden is on the defendant, Thomas Turnbull, to prove that the conveyance to him by his father was not procured by means of undue influence of or imposition for which the relations of the parties gave opportunity, but this is not true. We have recently held that the fact that a voluntary conveyance is made from father to son while the father is residing in the son's family, even though the conveyance deprives other children of their proportionate share in the father's property, is not presumptively fraudulent, and will not throw on the grantee the burden of proving the want of undue influence. The owner of property has a right to dispose of it during his lifetime as he sees fit, even though his act may, in itself, seem to be unfair and unreasonable with reference to the interest of other children than the one to whom the conveyance is made."

See, also, *Furlong* v. *Tilley,* 51 U. 617, 172 P. 676.

In its written decision in the instant case, the trial court relied upon the decision in the case of *Petersen* v.

Budge, 35 U. 596, 102 P. 211. However, the facts in that case are in no way similar to those in the instant matter. The relationship of physician and patient existed there, which the court held was sufficient in and of itself to create a "fiduciary or confidential relationship." But as we have seen from the authorities cited above such is not the case between parent and child. Furthermore, the Court in the *Budge* case, went on to point out:

> "We think the great preponderance of the evidence clearly establishes the following propositions: (1) That the plaintiff, at the time of the conveyance in question, was, and for about 10 days prior thereto had been, sick and nervous and greatly distressed in mind. (2) That, while in such mental condition, he was induced and led to believe by improper and undue influence that the bank was about to foreclose its mortgages and compel him to make a sacrifice of his mortgaged property. (3) That the confidential relationship of physician and patient existed between the Budges and Peterson at the time the deed in question was made and executed. (4) That if the Budges were not active participants in leading and inducing Peterson, in his highly nervous and demilitated condition, and while under great mental strain, to believe that the bank was about to foreclose its mortgages and compel him to sacrifice his mortgaged property — representations untrue in fact — they voluntarily accepted the conveyance, well knowing such representations to have been made, and such inducements brought to bear upon him. (5) That Peterson, because of his physical weakness and the nervous and unsettled state of his mind at the time the deed was made and executed, was in no condition to transact business requiring much exertion or mental strain. (6)

That the consideration paid by the Budges was wholly inadequate. (7) That the defendants have failed to sustain the burden of proof cast upon them by law to show that the transaction on their part was in every respect open, fair and equitable. Therefore, even if it were conceded that the Budges made no promises whatever to reconvey the property to Peterson, he still would be entitled to recover in this action."

In the case of *Amado* v. *Aguirre,* 63 Ariz. 213, 161 P. 2d 117, the Arizona Supreme Court stated the rule as follows:

> "A deed or gift from a parent to a child, or from one who, in fact, stands in the relationship of a parent to a donee, does not require absence of fraud and undue influence to sustain it. Under such circumstances, the relationship of parent and child is not a fiduciary relationship within the meaning of the rule applying to gifts or other transactions with a fiduciary. Bishop v. Hilliard, 227 Ill. 382, 81 N.E. 403; White v. Smith, 338 Ill. 23, 169 N.E. 817; Lee v. Lee, 258 Mo. 599, 167 S.W. 1030; Sullivan v. Clear, 101 Conn. 603, 127 R. 14; Couchman's Adm'r v. Couchman, 98 Ky. 109, 32 S.W. 283. This is also the effect of the decision of this court in Pass v. Stephens, supra."

The Court then went on to hold:

> "Moreover, to constitute such a confidential or fiduciary relation in cases of gifts from parent to child, brother and sister, aunt or uncle, and niece or nephew, which would authorize a presumption of undue influence and change the burden of proof, there must be proof of circumstances indicating actual dominance of the donee over the donor. 68 C. J. 762, sec. 451, Wills; Wessell v.

Rathjohn, 89 N.C. 377, 45 Am. Rep., 696; Cook v. Hilggins, 290 Mo. 402, 235 S.W. 807; Lee v. Lee, supra; Turner v. Gumbert, 19 Idaho 339, 114 P. 33; Stanfield v. Hennegar, 259 Mo. 41, 167 S.W. 1036; Mallow v. Walker, 115 Iowa 238, 88 N.W. 452, 91 Am. St. Rep. 158; Slayback v. Witt, 151 Ind. 376, 50 N.E. 389; Rowe v. Freeman, 89 Or. 428, 172 P. 508, 174 P. 727; Sawyer v. White, 8 Cir., 122 F. 223."

In the case of *Salvner* v. *Salvner,* 349 Mich. 375, 84 N.W. 2d 871, the Supreme Court of Michigan made some observations particularly pertinent to the facts in the instant case. We quote:

> "A gift from a parent to a child, particularly under the circumstances disclosed by the case at bar, raises no inference or presumption of undue influence. Rather, the burden rests in one asserting invalidity to establish it by satisfactory proof. 39 Am. Jur. 744.
>
> "On behalf of appellant it is contended that a fiduciary relation existed as between him and the defendants. The proofs do not support the claim. The daughter Thusnelda, and likewise the son, unquestionably did many things to assist their father, a perfectly natural course of conduct in view of his physical condition. However, the record falls far short of establishing that plaintiff was governed by their advice or that he depended on them in the making of decisions concerning his business affairs, or otherwise. It clearly appears that plaintiff, notwithstanding his physical condition, was able to determine for himself what he wished to do and to refuse to act against his own inclinations. What defendants did to assist him amounted to no more than would be prompted normally by the existing relationship."

POINT II

THE EVIDENCE WAS INSUFFICIENT TO ESTABLISH THAT DEFENDANTS "EXERTED UNDUE INFLUENCE" UPON THE BRADBURYS.

Although the fact alone that the trial court erroneously determined that a "confidential relationship" existed between the Bradburys and Defendants would require a new trial, Appellants urge that the evidence is insufficient in any respect to sustain the conclusion of law that they exerted undue influence upon the Bradburys. In order to make a determination of this issue the Court will be required to review the evidence. In this connection the language of the Court in *Corey* v. *Roberts*, 82 U. 445, 25 P. 2d 940, is particularly applicable. We quote:

> "In equity cases the appeal (Const. Utah, art. 8, sec. 9) may be on questions of both law and fact. Such is the appeal in this case. On such review the duty of this court requires an examination of all questions of law and all facts revealed by the record, and, after making such examination and due allowance for the better opportunity afforded the trial court to observe the demeanor of witnesses, and more advantageous position of determining their credibility and the weight to be given to the testimony submitted, this court, analogous to a trial de novo on the record, will determine from a fair preponderance or greater weight of the evidence whether or not the findings of the trial court are supported thereby. Lawley v. Hickenlooper, 61 Utah, 298, 212 P. 526."

In reviewing the evidence in the case we believe this court will be impressed with the testimony of the inde-

pendent witnesses and we therefore briefly summarize what they had to say.

Attorney TEX R. OLSEN testified that he had done no legal work for the parties prior to February, 1960, at which time Gordon Rasmussen came to his office and made an appointment for himself and his wife and Mr. and Mrs. Bradbury. (R. 234) It was an appointment set up for a Sunday because the Rasmussens could only be down there on a weekend. (R. 234, 235) When the parties came to his office he was told that the Rasmussens were thinking of moving down from Orem to Sevier County, leaving their job, to take care of the farm and that they wanted to work out some arrangement so the farm wouldn't go to anyone else after the death of the Bradburys. There was a discussion as to how to work this out so that the Rasmussens could take care of the property and of the Bradburys during their declining years. Mrs. Bradbury said in this conversation that she wanted to give these kids some security if they came down to the property. It was discussed that the use of a will could be changed and that therefore this would be no security because their son, R. G. Bradbury, could come in in the event there was a change. Mr. Olsen then suggested the giving of a deed, reserving a life estate to the Bradburys. The "Bradburys thought this would be agreeable with them because they wanted the property to go to the Rasmussens and they wanted some assurance that they would get something out of it during their lifetime." (R. 236) They then discussed how the property would be operated during the lifetime of the Bradburys and it was decided to execute a lease to the Rasmussens by which the net

profits derived from the farm would be divided fifty-fifty. (R. 237) In talking about the deed Mr. Olsen pointed out to all four that it would be "an absolute conveyance and if they had a life estate, they wouldn't have any security they could mortgage or anything else." (R. 237) The attorney even suggested leaving out the pasture ground and give the Rasmussens an option to buy it so the Bradburys "would have some security they could use." However, Mr. Bradbury said, "It's an operating unit." "It all goes together." (R. 238) The description of the property was discussed, and the Bradburys produced some tax assessment notices. These were blotched and could not be read so Mrs. Bradbury agreed to bring down some additional notices. (R. 238) The conference lasted about an hour and a half to two hours. (R. 239) They discussed getting together again but Mr. Rasmussen said he and his wife had to get back to Orem and wondered if they needed to be there any more. Mr. Olsen agreed to mail them the papers after they were prepared and signed by the Bradburys. (R. 239) About two days later Mrs. Bradbury came back to Mr. Olsen's office and brought several tax notices on which were contained the legal descriptions. At that time she asked Mr. Olsen if Yora was an heir and Mr. Olsen told her "No." Mrs. Bradbury then remarked that the other property they might have in their name would go to their son. (R. 240) Mr. Olsen agreed to call the Bradburys when the papers were ready.

On February 17th or 18th, 1960, Mr. and Mrs. Bradbury came to his office after the papers had been pre-

pared for signing. Mr. Olsen testified that he went over the arrangements, the warranty deed with the reservation of a life estate and also went over the lease with them, and they told him "that's what they had in mind." (R. 241) The deed was signed and notarized and the lease was signed. At that time Mr. Olsen gave Mr. and Mrs. Bradbury a carbon copy of the deed and also a carbon copy of the lease. (R. 241) He stated that he had observed that both Mr. and Mrs. Bradbury were alert, able to discuss these things; that Mr. Bradbury had quite a sense of humor; and even joked about the arrangement which he felt would require him to contribute financially to help the Rasmussens get started; (R. 242) that Mr. Bradbury was having some difficulty getting around because of his age, but otherwise appeared to be quite alert. (R. 242) At the time of the signing of the documents there was just Mr. and Mrs. Bradbury present in addition to the attorney. (R. 243) He thereafter mailed the documents to the Rasmussens. He prepared the assignments that were attached to the water certificates, but they were not signed in his presence. (R. 246)

On cross-examination Mr. Olsen said that the reason that the Rasmussens talked to him about having this fixed up is that they wanted to be protected if they came down on the property and that if the parents died they did not want to have R. G. "booting" them off the property. (R. 248, 249)

Otto Kesler, who resides at Cove Fort across the mountain from Joseph, testified that he had been

acquainted with George Bradbury during his life time. He said he had known him for better than 50 years and he also knew his wife. He recalled a conversation with Mr. and Mrs. Bradbury in June of 1960 or 61 when some cattle had gotten away from them and he saw Mr. and Mrs. Bradbury together with Gordon Rasmussen. This was the first time he had ever met Gordon Rasmussen. (R. 231) Mr. and Mrs. Bradbury told this witness that the Rasmussens were going to take care of them and they were turning the property over to him to take care of them during their old age; that their son R. G. had gotten discouraged and left the farm and he had given no help to them on the farm. (R. 232) On cross-examination he testified that Mr. Bradbury said, "I was letting them have it for taking care of me. I am letting them have it for taking care of us in our old age." (R. 232, 233)

JOSEPH O. NELSON, who lives in Richfield, testified that he knew all of the parties. (R. 251, 252) He worked for the Texas Oil Company and delivered gasoline to the farmers in the area which sometimes required credit to them. He had extended credit to George Bradbury and to his son R. G. (R. 252) When Gordon Rasmussen took over the operation of the farm and wanted credit, the witness discussed with Mr. Bradbury the company policy of not extending credit unless the owner of the property signed with the operator to guarantee payment for the oil products. He explained fully to Mr. Bradbury what the signature involved, read it over to him and Mr. Bradbury seemed to understand it, was able to hear him and discussed it with him. (R. 253-255) Mr. Nelson further

testified about a conversation that he had with George Bradbury before the signing of this guarantee in which Mr. Bradbury said that his son George couldn't run the place and that he couldn't continue to run the place; that Gordon Rasmussen was to have the property after Mr. and Mrs. Bradbury had passed away. He also said that they were to have the property if they took care of the expenses of Mr. and Mrs. Bradbury. (R. 257)

Mr. Keith Ogden, who lived in Marysvale and had been acquainted with the Bradburys for approximately 20 years and had business dealings with them, (R. 259) testified that in November, 1959, he and his wife had a conversation with Mr. Bradbury whom they had taken for a ride with them over to Scipio, Utah. (R. 259) In this conversation Mr. Bradbury said that he knew that his son could not run the property and he also knew that Gordon Rasmussen had a good job and that Yora worked and they had a good home in Orem; that he would have to make them a good deal if they were going to come down and help him out. "He said, 'I've leased it out for a couple of years and that wasn't much good,' so he told us that he told them that if they would take care of us the rest of our time, they could have it." (R. 261, 262) He said that his son R. G. had received two or three propositions and that he had tried to make it interesting for him, but R. G. said he wouldn't have it as a gift, that he was going out and get a job. (R. 262) He further testified that nothing was said about selling the property to the Rasmussens. (R. 263, 264)

Defendants even required the attendance by subpoena of the brother of Mrs. Bradbury who had leased the farm for approximately three years before the Rasmussens came down. Although he was understandably reluctant to testify, MR. M. D. FORMAN testified that he had advised Mr. and Mrs. Bradbury to sell the property but they didn't seem to want to; that he drove them up to Orem to talk to Mr. and Mrs. Rasmussen about the property. (R. 443) He had a conversation with the Bradburys about the Rasmussens coming down on the property and the Bradburys told him that the Rasmussens were coming down to take over the property and that they (the Bradburys) were to get one-half of the proceeds from the farm. (R. 434, 435) He said that in this same conversation the Bradburys told him the property was to revert to Gordon and Yora when they (Mr. and Mrs. Bradbury) were deceased. (R. 436) He further testified that he observed the relationship between the parties when they first moved down in the year of 1960 and they got along very well. But in the spring of 1961 that "all at once the devil jumped up and they were at each other's throats so I don't know what took place;" (R. 437) that on July 27, he took Mr. and Mrs. Bradbury down to St. George to see R. G. Bradbury and that as he was picking them up to bring them back, he heard their son say to them, "Well, we just as well fight it all the way." (R. 439)

The only persons produced by the plaintiffs who could be considered to be independent and have no interest in the outcome of the litigation were JUNIOR E. DIXON

and V. V. JENSON. MR. DIXON, a locker plant operator, testified that after Gordon Rasmussen came back, the Bradburys told the witness they "were making arrangements so that they could buy the farm." (R. 181) However, he couldn't remember in what year this conversation occurred (R. 187) and it was just a passing remark. (R. 182)

MR. JENSON testified he was in the dry cleaning business and knew Mr. Bradbury in his lifetime. (R. 403, 404) He talked to Mr. Bradbury once about his farm and was told that Gordon was going to buy it from him. (R. 405) This occurred in March or April after Gordon had taken over the farm.

This testimony while having some probative value as to whether Mr. Bradbury considered what had been done as being a sale, has no effect or weight on the real issue of whether Defendants had exerted undue influence upon the Bradburys. For such consideration we turn briefly to the testimony of the Bradburys themselves. This testimony was very contradictory in many respects, not only as between Mr. and Mrs. Bradbury but in the course of relating the facts by the same witness Mrs. Bradbury testified the papers were prepared and signed the first time they went to Mr. Olsen's office and in the presence of the Rasmussens. (R. 83, 84) Mr. Bradbury testified that they were there three times. (R. 213, 214) Mrs. Bradbury testified she discussed with Tex Olsen the effect of giving the property to Yora and her husband — whether Yora would still get something from the estate,

(R. 119) but she testified she couldn't understand when Mr. Olsen read the documents to them before they were signed. (R. 84) She testified she thought they were signing a contract for the sale of the farm. (R. 85) But she went on to testify that the only compensation or money that the Rasmussens were going to pay was one-half of the proceeds of what came off the farm (R. 135, 145) and that the only written agreement she thought they had was for the lease. (R. 146)

Although plaintiffs asserted (and the court found) that Mr. Bradbury had ailing eyesight and other disabilities incident to age, there is no claim that either Mr. or Mrs. Bradbury was mentally infirm. In fact, Mrs. Bradbury was very active physically, drove the car, wrote out the checks and otherwise participated in the business affairs of her husband. Despite his age, Mr. Bradbury was intelligent and alert and worked around the farm with Gordon Rasmussen, bought seed grain (R. 223), paid the taxes (R. 224) recommended buying cattle and assisted in doing so (R. 227, 228) and consulted with Gordon about how the farm should be operated. (R. 228)

Since Mr. Bradbury had passed away after the action was filed, his deposition was read as his testimony. Several changes had been made in it which the court allowed to be read although there was no evidence as to how the changes had been made, who made them, or the reason therefor. If Mr. Bradbury was alert enough to make changes in his testimony from having his deposition read to him, he was alert enough to understand a

deed and a lease when they were read to him — particularly since he had had previous experience of leasing the premises. In summary, he testified that the first time he knew the Rasmussens were going to come down and operate the farm was at Christmas time (R. 211) He said that he would sell them the farm for $300.00 per acre but there was nothing said about how much down or when they were to pay for it. (R. 212) There was no specified amount per year to be paid but they were to pay one-half of what was made from the farm after expenses were taken out. (R. 213) There was never any discussion about paying anything more than one-half of what they grew on the farm after expenses and the Rasmussens were not to pay after he died. (R. 213) He testified that he met with Tex Olsen in Tex Olsen's office three times and that they talked about this matter when Gordon and his wife were there and that Tex was going to fix up a lease to run the farm. (This was later changed on his deposition to read that he was going to fix a contract to purchase the farm.) (R. 214) Gordon did not say anything about going to buy the farm while they were in Mr. Olson's office. (R. 214) The agreement was that the defendants were to pay one-half of what they grew on the property after expenses were paid. (R. 216) He and his wife had taken some tax notices down to Tex Olsen's office because on the ones that they brought with them at first the descriptions were blotted so badly Mr. Olsen could not read them. (R. 216) He admitted signing Exhibits 1 & 2 (the warranty deed and lease). (R. 218) These documents were read to him before they were signed and he understood that the Rasmussens were

going to pay one-half of the crops after they had paid expenses. (R. 2193 He claimed he never signed the assignments of the water certificates and that he had been over to the irrigation company to check to see if they bore his signature and that they did not. (R. 220) He recognized that the certificates brought back by Yora were not the same ones that he had given out, but he never questioned why and had his wife put them in the box with the other papers. (R. 221) It was a year after these certificates were brought in by Yora that Mr. Bradbury questioned them and asked his wife to get them out again. They then talked to the Rasmussens about what had happened. (R. 222)

We submit that this does not support any finding or determination that he did not know what he was doing or that undue influence was exerted upon him.

This court has had the opportunity on numerous occasions to consider whether a transfer of property should be set aside on the ground of undue influence. In the very early case of *Chadd* v. *Moser*, 25 U. 369, 71 P. 870, this court reversed the trial court in setting aside a conveyance on the ground of undue influence and mental capacity. In doing so, this Court said:

> "The record shows conclusively that, at the time the deed was made, plaintiff was in possession and in full control of her mental faculties. She knew and understood what he was doing, and was in every respect competent to act for herself. She had the advice and assistance of a competent and reliable attorney, who took pains to explain to her what the legal effect of the act of deeding away

her property would be. In fact, there is no evidence whatever to the contrary, except the sweeping statement of plaintiff, made at the trial, that she was "crazy" and did not know what she was doing. The only evidence introduced that tends to support the contention of want of capacity on the part of plaintiff is that she was aged, in ill health, and very much enfeebled. But want of capacity to contract will not be presumed because of old age or physical infirmities. (Citing cases)

"It appears from the record that the plaintiff, about a year before the deed was made, spoke to the defendants about deeding the property to them, and subsequently, on several occasions, again mentioned the matter; but there is not a scintilla of evidence that either of the defendants ever mentioned the matter to her until the day on which the deed was executed. After they arrived at the office of the attorney who prepared the deed, there was some discussion as to whether the plaintiff should dispose of the property by will or by deed. Plaintiff was in favor of making a will, but the defendants refused to advance any more money to protect the property and improve it and help the plaintiff unless the conveyance was by deed, which they had a perfect right to do. No matter what moral obligations they were under to take care of plaintiff and protect her property, it must be conceded that they were under no legal obligation to do so. The plaintiff finally, in opposition to the advice of her attorney, decided to make a deed, which was done. Defendant Mrs. Moser, with the exception of about five years, had lived all her life with her mother, and had raised a large family under the same roof, and had recently cared for and nursed her through a severe spell of sickness. Defendants had for several years given plaintiff money to pay the taxes as-

sessed against the property. The property had been sold for assessments made for the extension of water mains, and more taxes, amounting to $31.50, would soon be due, which plaintiff was unable to pay. In addition to the care, attention, and assistance thus extended, the defendants, by the provisions of the lease, were obligated to continue to assist and provide for plaintiff during the rest of her life. Under these circumstances, coercion and undue influence will not be inferred. While courts of equity will carefully scrutinize transactions of this character, when entered into between parent and child, yet when, as in this case, as shown by the record, no undue influence has been used, such contracts will not be disturbed, provided the complaining party at the time of the transaction had legal and mental capacity to contract."

Again, in *Stringfellow* v. *Hanson*, 25 U. 480, 71 P. 1052, this Court reversed a decision of the lower court which had set aside a deed from father to daughter on the grounds of undue influence, inadequate consideration and incompetence of the grantor. The grantor, as here, was the party who initiated the action to have the conveyance set aside. The court discussed each of the grounds for annuling the deed relied on by the lower court, as follows:

> "We think the record wholly fails to show that defendant exercised any undue influence over the plaintiff at the time of, or prior to, the execution of the deed to the five acres. There is some evidence in the record that she (the defendant) had stated to some of her neighbors that she had received a revelation from her mother, and that it was her mother's wish that plaintiff deed the

land in question to her, and that she had communicated these alleged spiritual manifestations to her father. Plaintiff's deposition was taken in his own behalf, and read in evidence. He testified that, before the deed was made, Emma had spoken to him two or three times about having a revelation from her mother, but he does not state that he was influenced or induced to make the deed because of the alleged revelation. On the contrary, he repeatedly reiterated that he deeded the land to her because it was the wish of his wife, before her death, that Emma should have it, and because she had been kind to them, and had taken care of her mother during the latter's sickness. We do not think the finding that defendant used or exercised undue influence over plaintiff at the time the deed to the five acres was executed is supported by the evidence. It is a well-established rule of law that when a parent, who is legally competent to contract, makes a gift to his child in consideration of love and affection, it will be upheld. The conduct of Emma Hanson toward her aged parents was such as would naturally tend to inspire their love and gratitude, as it was clearly shown that she, for two years, with but little, if any, aid from any of her brothers or sisters, or other relations, constantly cared for and waited upon her invalid and helpless mother, and after her mother's death continued to care for, comfort, and administer to the wants of her old father in his bereavement. And the record affirmatively shows that in pursuance of the high and commendable devotion thus shown, and services rendered, and in pursuance of the mother's wish, made known to plaintiff, before his death, as shown by his own testimony, plaintiff conveyed to defendant the five acres of land in question. Under these circumstances, we think the consideration was not only meritorious, but valuable, and in every re-

spect adequate. 1 Jones, Law Real Prop. in Conv. 274; Brinton v. Van Cott, 8 Utah, 480, 33 Pac. 218. In the case of McCall v. McCall, 135 U. S. 167, 10 Sup. Ct. 705, 34 L. Ed. 84. Mr. Justice Brewer, speaking for the court, said: "Right or wrong, it would be expected that a parent will favor a child who stands by him, and give to him, rather than the others, his property. To defeat a conveyance under these circumstances, something more than the natural influence springing from such relations must be shown — imposition, fraud, importunity, duress, or something of that nature, must appear." Again: "It would be a great reproach to the law, if, in its jealous watchfulness over the freedom of testamentary disposition, it should deprive age and infirmity of the kindly ministrations of affection, or of the power of rewarding those who bestow them."

"It is contended by respondent that the only consideration for the conveyance that can be considered is that expressed in the instrument itself. We do not understand this to be the law. The rule is that in cases such as the one under consideration, where the rights of creditors are not involved, the entire consideration may be shown. Devlin on Deeds (1st Ed.) sec. 822; 1 Jones, Real Prop. in Conv.: sec. 295; Rankin's Adm'rs v. Wallace (Ky.) 14 S.W. 79; Barbee v. Barbee (N.C.) 13 S.E. 215."

In the recent case of *Richmond* v. *Ballard,* 7 U. 2d 341, 325 P. 2d 839, this Court, in reversing the lower court's finding of undue influence and deceased's advanced age and debilitated condition reiterated the criterion for setting aside a conveyance, as follows:

"Undue influence must be established by clear and convincing evidence. In Northcrest, Inc. v. Walker

Bank and Trust Co. this court, at page 271 of the Utah Report and at page 693 of the Pacific Reporter, said:

> 'Undisputed is the plaintiff's contention that one who asserts the invalidity of a deed must so prove by clear and convincing evidence.'

"Not only did the evidence fail to establish that the signature to the deed was procured by undue influence but the finding of undue influence is against the clear weight of the evidence."

The Court further quoted with approval from two earlier Utah cases, *Anderson* v. *Thomas,* 108 U. 252, 159 P. 2d 142; and *In re Lavelle's Estate,* 122 U. 253, 248 P. 2d 372.

In the Anderson Case the evidence relied on by the plaintiff to set aside the conveyance included the following facts:

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

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

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

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

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

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

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

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

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

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

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

In the case of *In re Lavelle's Estate,* supra, this Court reversed a finding that a will had been induced by undue influence. This Court, speaking through Justice Crockett, held:

> "To declare a will invalid because of undue influence, there must be an exhibition of more than influence or suggestion, there must be substantial proof of an overpowering of the testator's volition at the time the will was made, to the extent he is impelled to do that which he would not have done had he been free from such controlling influence, so that the will represents the desire of the person exercising the influence rather than that of the testator."

Courts in other jurisdictions have held similarly. The California Supreme Court in the case of *Burns* v. *Campbell*, 17 Cal. 2d 768, 112 P. 2d 237, reversed a decision of the lower court holding a deed to have been procured by undue influence with these pertinent comments:

> "Concerning undue influence, there is no evidence whatever that the appellant exercised any control over Mr. Burns or that her actions were the result of his direction. In addition to the testimony concerning the conversation between Mrs. Burns and appellant when she asked him to return to the ranch, two other witnesses related statements made by her at later times on this subject. One of them said that in 1932 Mrs. Burns told him she was going to deed the ranch to the appellant because he had done more for her than anyone else, with the exception of her sons. Another related that she told him she had executed the deed to him. The testimony of the attorney who prepared the deed is clear and unequivocal that Mrs. Burns expressed the desire to convey her ranch to the appellant and that she stated her reason for so doing. There is no evidence that the appellant ever requested her to execute a deed to him or that he influenced her in that or any other matter."

The court also commented that the "trial court made findings in literal accordance with the allegations of the complaint." (Ibid. p. 239) This was also done by the trial court in the instant case although a few changes were made after Defendants objected and argued their motion to amend the findings.

One of the findings made by the trial court in this case is that the Bradburys "did not have the benefit of

independent advice in connection with said transactions." (R. 52) However, Mr. Olsen had never represented either of the parties before; (R. 234) the Bradburys were there twice and discussed the matter with him after the Rasmussens; (R. 240, 241) the Bradburys paid him for his services; (Exh. 9, R. 477) and the trial court held that their conversation with him, after this action was commenced, was privileged and could not be disclosed. (R. 125-127)

In *Binder* v. *Binder,* 50 W. 2d 142, 309 P. 2d 1050, the Washington Supreme Court reversed a decision of the lower court which annulled and cancelled a deed given by the plaintiff (mother) to the defendant (her son). As to the burden of proof the Court held:

> "Mental competency is presumed; and in order to establish mental incompetency, fraud, or undue influence, the evidence must be clear, cogent, and convincing. Tecklenburg v. Washington Gas & Electric Co., 40 Wash. 2d 141, 241 P. 2d 1172, 1174."

Again, on the matter of undue influence, the court held:

> "In order to sustain the finding of undue influence in this case, where no mental incompetency has been shown, the record must reveal that the respondent was so completely under the influence of appellant that she was incapable of acting on her own motives:
>
> > " 'Influence becomes undue only when it overcomes the will of the grantor; when the grantor acts under such coercion that his own free agency is destroyed. The grantor's views may be radically changed by the in-

fluence exercised, but so long as he is not overborne and rendered incapable of acting upon his own motives, his acts are his own acts, not those of another.' Parr v. Campbell, 109 Wash. 376, 186 P. 858, quoted in Vossen v. Wilson, 39 Wash. 2d 906, 239 P. 2d 558, 560."

We submit from the foregoing analysis of the facts and the law that the evidence was insufficient to support the determination of undue influence.

POINT III

THERE WAS ADEQUATE CONSIDERATION FOR THE TRANSFER OF THE PROPERTY AND THE EXECUTION OF THE LEASE.

The plaintiffs argued, and the Court found in effect, that the transfer of the property and water stock was a gift and without consideration (Finding No. 13(c) and (d) R. 52). However, the Court further found, as set forth in the Statement of Facts, that Bradburys were interested in having the Defendants move to Sevier County and live close to them "where they could have the companionship and association with defendants and their children during their declining years"; and that "Defendants gave up their home in Orem, Utah, and moved to Sevier County and took over the operation of the farm." In doing so the Defendants testified that they both gave up good jobs in Orem. Mr. Rasmussen was making around $400.00 per month and Mrs. Rasmussen was making about $225.00 per month. (R. 282)

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

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

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

Also:

> "Without delineating them, we observe that the evidence reveals some discrepancies in plaintiff's testimony concerning the ownership and disposition of personal property which may have given rise to some skepticism on the part of the trial court with respect to plaintiff's frankness, or perhaps better stated, her lack of memory and understanding of details due to her infirmity and advanced age.
>
> "The plaintiff made some effort in the evidence to support her first point that the execution of the conveyances were not voluntary. The sequence of events themselves, without more, would be sufficient refutation of this contention. But taken together with other evidence there is ample to warrant the court in refusing to believe that plaintiff had met her burden of proof that she did not intend the conveyances."

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

There was obviously adequate consideration for the transfer in the instant case and the court should have so found. We wish to call attention to the fact that the trial court did find:

> "That at all times during the negotiations for the sale and purchase of the farm George R. Bradbury, deceased, and Althea Bradbury advised Defendants that the farm would be theirs upon the death of the Bradburys, by virtue of contractual obligations and subject thereto." (Finding No. 8, R. 51)

The contractual obligations referred to by the court could mean only the obligation to move to Joseph, Utah, and take over the farm and live near the Bradburys, where the latter could enjoy the companionship and association of Defendants and their children. Since Defendants complied in every respect they are entitled, as the Defendant in the *Brimm* case, *supra,* to have the contract and agreement enforced.

POINT IV

DEFENDANTS WERE ENTITLED TO A JURY TRIAL.

Plaintiffs initially filed a demand for a jury trial. (R. 16) Thereafter, at the pretrial conference Plaintiffs attempted to withdraw their demand; but Defendants refused to agree thereto and requested the court to try the case to a jury. Rule 39(a) *U.R.C.P.* provides:

> "When trial by jury has been demanded as provided in Rule 38, the action shall be designated upon the register of actions as a jury action. The trial of all issues so demanded shall be by jury, unless (1) the parties or their attorneys of record, by written stipulation filed with the court or by an oral stipulation made in open court and entered in the record, consent to trial by the court sitting without a jury, or (2) the court upon motion or of its own initiative finds that a right by trial by jury of some or all of those issues does not exist, of (3) either party to the issue fails to appear at the trial."

The court determined that the right of a trial by jury did not exist, this being a case in equity, and therefore

dispensed with a jury. Since no record of the pretrail proceedings was made, the record on appeal does not disclose the ruling of the trial court. However, the record does disclose that the case was not tried to a jury and that such jury trial was not waived by Defendants after demand had been made.

Section 78-21-1, *U.C.A.* 1953 gives to the parties a right to trial by jury "in actions for the recovery of specific real or personal property, with or without damages." In discussing when a trial by jury is required under our statute this court, in the case of *Norbeck* v. *Board of Directors of Church Extension Society,* 84 U. 506, 37 P. 2d 339 held:

> "Almost without exception, the rule is that actions to try the title of real estate shall be tried to a jury."

The court further stated:

> "The mere fact that a suit is one to quiet title to real property is not controlling. Generally a suit to quiet title to real property is regarded as an equitable proceeding; but because it is so regarded does not determine the nature of the issue or deprive a party of his right to a trial by jury. If the only question involved is that of title, the issue is generally legal. A suit to establish an easement is legal. Mason v. Ross, 77 N.J. Eq. 527, 77 A. 44."

This matter was recently considered by Justice Wade in a separate opinion in the case of *Johnson* v. *Johnson,* 9 Utah 2d 420, 337 P. 2d 20. That case involved an action

to rescind certain conveyances of real property, Justice Wade made the following observation:

> "I concur except I think this is an action to recover real property and under Section 78-21-1 defendant was entitled to a jury trial. That section provides that "(I)n actions for the recovery of specific real or personal property, with or without damages * * * an issue of fact may be tried by a jury, unless a jury is waived or a reference is ordered." We have held a number of times that this statute is controlling.
>
> "Defendant did not claim the right to a jury under this statute. He claims that this is a law action because it is a will contest. He seems to concede that the action to recover the real estate is a suit in equity because it seeks to set aside a contract of sale and a conveyance and a will on the ground of fraud, undue influence and incompetency. It is hard to understand how a will contest is a law action but a suit to cancel a will before the testator's death but after he has become incompetent is a suit in equity. This illustrates the maze of inconsistencies and borderline decisions required in applying the rule that the right of a jury trial is determined by whether the question is raised in an action at law or a suit in equity or whether the issues are legal or equitable."

SUMMARY

In conclusion Appellants respectfully urge that there was no "confidential relationship" between Bradburys and Defendants and therefore that the court below erroneously placed the burden on the Defendants "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 relationships."

Because of its misconception as to the relationship between the parties, the lower court concluded that there was undue influence exerted on the Bradburys by the Defendants although the evidence is insufficient to show by clear and convincing proof any undue influence. On the contrary the transfers were made, and the lease executed, for good and sufficient consideration after the Bradburys discussed the matter with legal counsel and obtained his advice as to how the matter should be handled. And finally, the court improperly failed to allow the matter to be tried by a jury after a jury trial had been requested.

Respectfully submitted,

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