

1949

# J. M. Webb v. Margaret Webb : Reply Brief of Appellants

Utah Supreme Court

Follow this and additional works at: [https://digitalcommons.law.byu.edu/uofu\\_sc1](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.

Jensen & Jensen; Attorneys for Defendants and Appellants;

Cline Wilson & Cline; Attorneys for Plaintiffs and Respondents;

---

## Recommended Citation

Reply Brief, *Webb v. Webb*, No. 7208 (Utah Supreme Court, 1949).

[https://digitalcommons.law.byu.edu/uofu\\_sc1/930](https://digitalcommons.law.byu.edu/uofu_sc1/930)

This Reply Brief 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](mailto:hunterlawlibrary@byu.edu).

---

# IN THE SUPREME COURT OF THE STATE OF UTAH

---

J. M. WEBB, and  
SPENCER WEBB,

Plaintiffs and Respondents,

vs.

MARGARET WEBB and  
MARGARET WEBB AS  
ADMINISTRATRIX OF  
THE ESTATE OF  
WILMER WEBB, Deceased.

Defendants and Appellants.

No. 7,208

**FILED**  
FEB 11 1940

CLERK, SUPREME COURT, UTAH

## APPELLANTS' REPLY BRIEF

Appeal from the District Court, Millard County, Utah  
Honorable Will L. Hoyt, Judge

JENSEN & JENSEN  
Attorneys for Defendants and Appellants

CLINE, WILSON & CLINE  
Attorneys for Plaintiffs and Respondents

## CONTENTS

	Page
On Right To Trial by Jury _____	1-7
Sufficiency of the Evidence _____	7-13
Incompetent and Hearsay Conservations _____	13-16
Reply to "Miscellaneous" Argument _____	16-10
Administratrix's Right to An Accounting _____	2-24
Conclusions _____	24

## INDEX TO AUTHORITIES

Board of Education of Salt Lake City v. West 55 U. 357; 186 P. 114 _____	3
Corp. of Latter Day Saints v Watson 25 U. 45; 69 P. 531 _____	14, 18
Emerson-Grantingham Implement Co. v. Giles et al 59 U. 54; 202 P. 543 _____	3
Ezzell v. Endsley, 169 P. 2d 309 (Okl) _____	4
Gibson v. McGurrin et al, 37 U 158; 106 P. 669 _____	4
Ketchum Coal Co. v. District Ct. of Carbon Co. et al, 48 U. 342; 159 P. 737 _____	6
Nieimeier v. Rosenbaum, 63 P. 2d 424 _____	4
Osage Oil & Refining Co. v. McDowell et al, 220 P. 609 (Okl) _____	4
Norbach v. Board of Ed. of Ch. Exten. 84 U. 506; 37 P 2d. 339 _____	2
Park v. Wilkinson, 21 U. 279; 60 P. 945 _____	5, 6
Parsons v. Cashman et al, 137 P. 1109 (Cal) _____	18
Petty v. Clark, 102 U. 186; 129 P. 2d. 568 _____	5
Rogers v. Scott et al, 151 P. 379 _____	18
Sandall v. Sandall, 57 U. 150; 193 P. 1093 _____	15
Sparks v. Hinckley, 78 U. 582; 5 P. 2d. 570 _____	20
State Building and Loan Ass'n v. Perkins et al 54 U. 474; 173 P. 950 _____	5
Thompson v. Anderson, 107 U. 331; 153 P. 2d 665 _____	3
Thompson v. Brown Livestock Co. et al 74 U. 1; 276 P. 651 _____	2, 6

## STATUTES AND DIGESTS

U. C. A. '43, 104-23-5 _____	2
U. C. A. '43, 104-23-6 _____	3
U. C. A. '43, 104-49-2 _____	15
5 Am. Jur. sec. 29 p. 379 _____	15
21 A. L. R. 928 _____	15
101 A. L. R. 1097-1106 _____	19
70 C. J. p. 348 _____	16
Utah Bar Bulletin, July-Aug. '41, Justice Wolfe	15
Jones on Exi. Civil Cases, 4th ed. sec 356 p. 659 _____	15

# IN THE SUPREME COURT OF THE STATE OF UTAH

---

J. M. WEBB, and  
SPENCER WEBB,

Plaintiffs and Respondents,

vs.

MARGARET WEBB and  
MARGARET WEBB AS  
ADMINISTRATRIX OF  
THE ESTATE OF  
WILMER WEBB, Deceased.

Defendants and Appellants.

No. 7,208

---

## REPLY BRIEF

---

### ON RIGHT TO TRIAL BY JURY

Herein "A. br." refers to appellants' brief, and "R. br." refers to respondents' brief.

Among other things, the court in settling the bill of exceptions herein made the following findings:

"4. That the issues herein were first joined on July 10, 1947.

"5. That on July 14th, 1947, the clerk of this court received from counsel for the defendant a check for five dollars as a jury fee, and which letter contained the following request for a jury, to-wit:

'We respectfully request you and the court to have the above case set on the jury calendar and that the setting be sometime after September 2nd, 1947.' " (R. 356).

On July 15, 1947, in open court and in absence of counsel for the defendants, said request for a jury trial was denied. Prior to this time, both the court and counsel for the plaintiffs had been advised that we were unable to leave the trial of another case to try this case during June or July, 1946.

Respondents concede in their brief that the issues tendered by their complaint and joined thereon by the defendants' answers, are legal issues. The issues joined by plaintiffs' reply to the administratrix's second cause of action, are also legal issues. (R. 24, 28; A. br 8-9). Whether there was any contract between Wilmer Webb and his brothers for his support and maintenance, and whether there was any consideration for such a claimed contract, may well be a legal issue for a jury, *Thompson v. Brown Livestock Co., et al*, 74 U. 1 at p. 21-22; 276 P. 651.

"In 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 waived \* \* ."

U. C. A. '43, 104-23-5.

"We are of the opinion the instant case is an action at law. Almost without exception, the rule is that actions to try the title of real estate shall be tried to a jury."

*Norbach v. Board of Ed. of Ch. Exten.*, 84 U. 506 at p. 515; 37 P. (2d) 339.

Did defendants waive a jury trial? Did the demand for a jury trial come too late? This court has held that where the demand for a jury trial was first made on the date the case was called for trial, it came too late, "there being no jury upon attendance," of the court, *Emerson-Grantingham Implement Co. v. Giles et al*, 59 U. 54; 202 P. 543. Similar is the case of *Board of Education of Salt Lake City v. West*, 55 U. 357; 186 P. 114, where the request for a jury was made seven days before the date the case was called for trial and more than two and one half-months after the case was set and awaiting trial.

The rule of court in the Third District Court to carry out the statute of the reasonable time in which to "notice the motion" to have the case changed from a non-jury setting to a jury setting is "five days before the date of trial" as reported in *Thompson v. Anderson*, 107 U. 331 at p. 335; 153 P. (2d) 665.

Now, September 2, 1947, was the opening day of the fall term in the District Court of Millard County, Utah. In this district, terms have been set for the convenience of jurors, and the presumptions of difficulty in getting a jury at that time are not well taken.

At the time of the setting of this case for trial, which was forty-eight days before the trial date, the court had before it our written request for a jury trial. All Section 104-23-6 U. C. A. 43 provides is that the person desiring a jury trial "must demand it, either by written notice to the clerk prior to the time of setting such action for trial, or \* \* ."

The rule quoted by respondents is to the same effect.

Certain it is that this case was set for trial on the 15th day of July, 1947, in our absence and for a non-jury trial. At that time, a written demand had been made for a jury trial, and the fee tendered. The court refused to permit the clerk to accept the fee, and immediately ordered it returned.

An examination of the case of *Osage Oil & Refining Co v. McDowell et al*, 220 P. 609 (Ok1), does not disclose when, if at all, there was a demand for a jury trial. All that appears in the report of the case is: "that the parties in open court waived a jury"; and that on account of illness of the judge, the trial was continued from December 9th to December 15th, when it was tried.

Likewise, the report of the case of *Ezzell v. Endsley*, 169 P. (2d) 309 (Ok1), does not disclose when, if at all, there was a demand for a jury trial. All the report of the case discloses is that the court "correctly held Ezzell to a previous stipulation to waive a jury." What the respondents quoted is the syllabus, and that states when the case "was called for trial" the parties waived a jury.

From an examination of the report of the case of *Niemeyer v. Rosenbaum*, 63 P. (2d) 424 (Wash), one cannot determine when the demand for a jury trial was made in relation to the trial date. From examination of the report, it may be that the demand was made on the date of trial.

The above three cases are much the same as our own case of *Gibson v. McGurrin et al*, 37 U. 158 at p. 167; 106 P. 669, wherein it states: "In this case, there is nothing to indicate that the respondent ever demanded a jury."

It is agreed by both sides there were equitable issues

tendered by the affirmative defenses and counterclaims. These were properly triable to the court.

We concede that the issues of whether the deed and bill of sale were in truth and in fact a mortgage, are equitable issues. We concede the issues are equitable as to whether the deed and bill of sale in question should be set aside as to Margaret Webb individually, and set aside as to the administratrix of the estate of Wilmer Webb, deceased. On said issues, the jury would have been advisory to the court, *Utah State Building and Loan Ass'n. v. Perkins et al*, 53 U. 474, 173 P. 950.

By what standard it can be determined which of these issues are major and which minor, does not appear from the cases. It does appear this court has held legal and equitable issues in the same case are to be separately tried. To support respondents' contention that the trial was proper in this case, they quote from Justice Wolfe's concurring opinion in *Petty v. Clark*, 102 U. 186; 129 P. (2d) 568 at page 571, wherein is given the supporting citation of *Park v. Wilkinson*, 21 U. 279; 60 P. 945. Upon examination of that case, we find the second syllabus of the case is well supported by the decision. Said syllabus is:

"Actions to quiet title or to determine adverse claims under sec. 3511, R. S. 1898, may be of a legal or equitable character, depending upon the pleadings; but where there are both equitable issues and issues of fact in the case, the court should first determine the equitable issue, and then submit the issues of fact to a jury upon proper instructions, and a failure so to do constitutes reversible error."

This decision has been followed in this jurisdiction:

"This court has also held that when in a case both equitable and legal issues arise and it becomes necessary



to determine the equitable issues before proceeding to an adjustment of the legal rights of the parties, or some of them in such event the court must determine the equitable issues first. *Park v. Wilkinson*, 21 U. 285; 60 P. 945, and cases there cited."

*Ketchum Coal Co. v. Dist. Ct. of Carbon County et al*  
48 U. 342 at p. 353; 159 P. 737.

This doctrine has not been repudiated or modified by our court. About this doctrine our court later said:

"Further, it is a familiar rule that objections that a case is not of legal, but of equitable, cognizance must be timely interposed and at the threshold of the case. 3 C. J. 756. The decisions of this jurisdiction are in harmony with that. *Park v. Wilkinson* 21 U. 279, \* \* ."

*Thompson et al v. Brown Livestock Co., et al*, 74 U. 1, at p. 22; 276 P. 651.

At the outset of this case, we agreed there were equitable issues in this case which should be tried by the court; but on those, asked the jury to be advisory. Our position was, and is, there are substantial and material issues herein which should be submitted to a jury. We maintained our right to a jury trial and took our exception to proceeding without the jury. Upon this matter, we submit that appellants did not mislead the court; but to the contrary, timely and properly demanded the trial by jury. The court refused to give appellants the right of such a trial.

In view of the statements of counsel for the respondents that "appellants adopted a course of delays in pleading and further delays in getting the case to trial" and that "In fact, it would be tantamount to holding that litigants, by securing one or more delays or continuances after a case is once set trial, could secure a jury trial by artifice and indirection when such a right could not be otherwise secured" it is only fair

to state the facts which counsel for respondents knew about the extensions of time.

Our client has had no business or property experience. She was a widow without a home, property or income. From the inception of this case, we negotiated for, and urged the plaintiffs for, a compromise which would at least leave the appellant herein a home in which to maintain herself and raise her children. Progress was made upon these negotiations, and it was not until the time of trial that they broke down. In addition, counsel for the appellants during the spring and summer of 1947, were involved in trying the case of Whittaker v. Spencers et al, now No. 7181 before this court, in which eight attorneys were waiting upon the trial court. Until the court released us from that trial, we could not try this case.

We have examined all cases cited by the respondents. We find no case which holds that a demand for jury trial came too late which was made at the setting (or reset) at least forty-five days before the trial date. We find no case where a court upon substantial legal issues refused to grant a jury trial under similar factual situations. We submit on the legal issues herein that defendants were, and are entitled to a jury trial.

---

## SUFFICIENCY OF THE EVIDENCE

This appeal is made on the basis that the evidence clearly preponderates against said findings. To limit the examination of the testimony to that of Mr. Crafts and Mrs. Webb, is an error into which respondents have fallen. To support such error, they claim as evidence the incompetent, hearsay tes-

timony of Mr. Crafts and the plaintiffs. In addition to appellants' argument in her brief, we make the following reply thereon:

Wilmer Webb's direction to the plaintiffs, by his letter of March 8, 1946, written for him by his niece, was to "go to the secretary or trunk and get the deed to the house and bring up so he can mortgage it to set some money for his hospital fee," (Ex. A. tr. 17). This is the representation which Jack Webb made to Margaret Webb on the night of March 9, 1946, when he presented said Exhibit "A" to her — that the instrument to be prepared was a mortgage. There is nothing in all the writings of Wilmer Webb or the competent testimony of what Wilmer Webb said to change that authority and direction. Can the respondents claim that letter was authority for their taking and converting to themselves, each and all Wilmer's savings bonds, the title certificate to his car, and his water certificates? Can the transaction of March 14 to 18, 1946, inclusive, be sufficient evidence to support said finding that said property became that of the plaintiffs? Plaintiffs fail to point out any evidence to support such findings. We find no such evidence in the record to support said claims.

The respondents assert there is substantial evidence to support findings we attack. We call the court's attention to the status of the pleadings and evidence upon the question whether Margaret Webb intended to deed the home place when she signed the purported deed, and whether she knew it was not intended to be a mortgage, and that she was fully informed as to the nature of the instrument, (Finding 8).

Paragraph III of the administratrix's counterclaim alleges:

"That on and between the 21st day of July, 1945, and the 4th day of July, 1946, the decedent, Wilmer E. Webb, was the owner of and, together with the defendant herein as his wife, during said time was in possession of the following described property in Millard County, Utah to-wit:

"All of Lots Three (3) and Four (4), Block Seventeen (17), Plat "A" Deseret Survey, being part of Section Five (5), Township Eighteen (18) South, Range Seven (7) West, Salt Lake Base and Meridian.

"That thereon was and is situated the home of said Wilmer E. Webb and of Margaret Webb, his widow. That at all times herein mentioned since the commencement of the above entitled action, the defendant, Margaret Webb, has been and now is in possession of said property and claims the same as a widow's homestead under said Wilmer E. Webb, deceased, for herself and said three minor children." (R. 20-21; A. br. 5).

The reply of the plaintiffs thereto is as follows:

"4. Admit the allegations of paragraph 3 of said counterclaim, but deny that the said defendant is entitled to the possession of the property described in said paragraph either as widow's homestead or otherwise." (R. 27; A. br. 11).

We have gone all through this case, and those pleadings have stood as they are — admitting that Wilmer Webb was the owner of said real property, which is the home place, up to and including the 4th day of July, 1946, which was the day of his death. Can that admission be ignored? We say not. It appears to us that said admission is strong evidence that the purported deed in question is but a mortgage. For the plaintiffs to have the purported deed from March 18, 1946, to July 4, 1946, and admit they were not the owner of the real estate herein described but that the purported grantor

therein is the owner thereof, seems to us in and of itself to require a finding that upon the home, said purported deed is a mortgage.

About the manner in which the property would be held under the purported deed, Mrs. Webb testified Mr. Crafts said:

“ \* \* He said that turning — if we would sign this property over to the brothers they would pay his hospital bills, then if such time came that he was able to work again, all he would have to do would be to repay the money they had spent and his property would be returned to him.” (tr. 31, 66, 91).

That is the way Margaret Webb understood and intended the instrument to be.

The evidence shows she was inexperienced in business and did not know anything about descriptions; that she asked her husband on March 18, 1946, whether he knew the home place was in that purported deed; and he advised her he didn't, but to not bother until he came home (tr. 39, 40, 53, 66).

Then, too, there was no change of possession of the property after the execution of the purported deed; everything moved along just the same until after Wilmer's death. There was no care and attention given under the claimed agreement.

Another error of the respondents is that they base their claim to a bona fide transaction with Mrs. Webb upon this position: “Mr. Crafts then went to see Margaret Webb on March 14th, at Deseret” (R. br. 24). That visit was on the 15th of March, and not on March 14, 1946. That one day's

difference, with other evidence, takes from Mr. Craft's testimony in many respects its accuracy.

Let it be observed that nowhere in the record is there any evidence that there existed between Wilmer Webb and Margaret Webb, husband and wife, any ground or cause for divorce; that Mr. Webb has consulted Mr. Crafts concerning his domestic difficulties; but that Mrs. Webb regarded them as trivial, and would not sign any papers toward getting a divorce; that Mr. Crafts' announced views was these domestic problems were trivial, and the differences could have been adjusted. Now, on the day before he went to see Mrs. Webb about the claimed reconciliation, what did he do?

The hearsay, incompetent testimony, in part shows: that, on the day before Mr. Crafts first saw Margaret Webb, he called the plaintiffs to his office. Just after lunch on March 14, 1946, the plaintiffs came to his office (tr. 209). Mr. Crafts then told the plaintiffs the condition of Wilmer was serious; that his spine had been disintegrating since he was taken ill; that two of the vertebra were seriously affected and that the calcium was leaving the vertebra and going into circulation; that he might live a number of months or a number of years, but would be a helpless cripple the rest of his life; and that it was probably Wilmer's desire to transfer all of his property to them (tr. 204, 209).

There is no doubt but what the plaintiffs and Mr. Crafts then knew Wilmer's illness would be fatal. The defendant pleaded in part: (from defendant, Margaret Webb's Answer and Counterclaim):

"5. \* \* that about February 1946, the plaintiffs were informed and believed that the ailment of said Wilmer E. Webb would be fatal and that he would not recover from the same. That said fact and information was not

known to defendant until the middle of June, 1946 when the doctor for Wilmer E. Webb so advised defendant." (R. 15); tr. 180-3).

The reply of the plaintiffs thereto pleaded:

"5. Admit the allegations of paragraph 5 of the said counterclaim excepting that plaintiffs deny the defendant did not know the ailment of said Wilmer E. Webb would be fatal until the middle of June, 1946, but allege upon the contrary the defendant was aware of such fact as quickly as these plaintiffs." (R. 30; tr. 180-3)

It was this afternoon of the 14th of March, 1946, as we have pointed out in our brief (p. 44-5), that the plaintiff's, with Mr. Crafts' cooperation, moved out to take over Wilmer's property. It was that afternoon when the partnership fund was withdrawn and the check of \$500.00 drawn to pay Mrs. Webb (tr. 50; A. br. 44-5). It was in the conversations on the afternoon of March 14, 1946, in the presence of Mr. Crafts that the plaintiffs agreed between themselves they were to get all of Wilmer's property (tr. 244).

On the next day, the 15th of March, 1946, when Mr. Crafts first saw Mrs. Webb, he did not acquaint her with the fatal nature of the illness of her husband (tr. 31, 193-6). He did not acquaint her with the events of the day before in which he participated; and he did not acquaint her with the status of the property of Wilmer Webb; and erroneously advised her as to the urgent need of money. However, it is clear from the record that Mr. Crafts, claimed agent of Wilmer Webb, and the plaintiffs, considered it imperative to obtain from Mrs. Webb on March 15, 1946, a purported divorce and property settlement before she could get independent advice. Did she "accept" the \$500.00? She did not; but submitted it to her husband for his determination.

His advice was to do nothing with it until he came home (tr. 39).

Wilmer Webb took Mrs. Webb and her three children into his home. He held them out to the world as his family. Can it be then that for an offer of a mess of pottage—a one thirty-fourth of the value of the estate — and without timely advice, by concealment and misstatements, the plan to take this property away from his widow and family, will be successful? To the contrary, it is well said that the whole world owes a fiduciary duty to an inexperienced woman in regard to business affairs. It is difficult to imagine a clearer case of over-reaching, inadequate counseling, and active concealment of the husband's true condition and the status of his property, than in this case. Upon the clear, convincing, preponderance of evidence, the court should have found that the deed and bill of sale were what Wilmer Webb directed them to be, and what the purported deed was represented to be to Mrs. Webb — a mortgage to secure the money to pay his doctor and hospital bills.

### INCOMPETENT AND HEARSAY CONVERSATIONS

Dudley Crafts did not represent Margaret Webb, nor claim to. Neither did Wilmer Webb represent her. Mr. Crafts, a friend of Wilmer Webb and his attorney on domestic relations problems, called unexpectedly on Mrs. Webb to propose a divorce and property settlement. First, let us treat the question as to hearsay conversations against Margaret Webb.

Both of the conversations between Wilmer Webb and  
Dudley Crafts, March 10-13, and sometime after March 15,



1946, at the Hospital in Salt Lake City, were outside of the presence of Mrs. Webb. The same is true of the two conversations between the plaintiffs and Mrs. Crafts in his office in Delta on the 14th and 15th of March, 1946. With neither Mrs. Webb or anyone to represent her in these conversations, they were heresay and inadmissible as to her, Corp. of Latter Day Saints v. Watson, 25 U. 45 at p. 50; 69 P. 531. The respondents assert said conversations to be admissible because Margaret Webb testified to part of her conversation of March 18, 1946 with Wilmer Webb about the \$500.00 check and the purported deed. Plaintiffs objected to said testimony of Margaret Webb on the ground that it was hearsay. We did not resist that object as to Margaret Webb as an individual, but as to the administratrix claimed it was admissible. The court admitted said conversation with the right of plaintiffs to move to strike. Plaintiffs did not move to strike. We maintain our objections of heresay, were well taken. (See our assignments Nos. 3, 3a, 3b, 3d, 4, 5, 6 and 7 — our brief pages 66-72.)

On the grounds that said conservations were incompetent as to Margaret Webb, individually, the preceding paragraph is applicable. We submit the proposition to be sound, that unless Mr. Crafts was proved to be the agent or attorney of Wilmer Webb to make the claimed agreement, purported deed, and bill of sale, the conversations outside of the presence of Margaret Webb are also incompetent to her as administratrix.

We timely made the objection that the plaintiffs could not establish said agency by the declarations of the agent, himself (tr. 189). Our objection was denied and overruled. In addition, Mr. Crafts testified concerning his agency and

employment by Wilmer Webb: “ \* \* I wouldn’t hardly say it was employment, I had been previously employed by him. I was requested, as a friend of his by him, to do certain things.” (Tr. 189).

“Doubtless, it is essential to the admission of the declarations of agent as part of the *res gestae* that the fact of agency or authority be first proved. This fact cannot be proved by the declarations themselves, no matter how publicly made, nor by declarations accompanied by acts purporting to be performed in behalf of the principal, unless they are brought to the latter’s knowledge.”

Jones on Ev. Civil Cases, 4th ed. sec. 356, p. 659.

“In our opinion, it would be a dangerous precedent to hold that the relationship of attorney and client in a particular case can be established by the fact that such relationship exists in some other case, even though the subject matter of the two cases may bear some apparent relation to each other, \* \*”

Sandall v. Sandall, 57 U. 150 at 161; 193 P. 1093.  
5 Am. Jur. sec. 29 p. 279

Defendants objected to the admissibility of said conversations under our statute U. C. A. '43 104-49-2, on the ground said conversations were incompetent, and also that the witness was incompetent to give over the objection of the administratrix of Wilmer Webb’s estate. The article of Justice Wolfe in the Utah Bar Bulletin of July-August, 1941 points out:

“Although the question has apparently not been decided in Utah, there seems to be nothing in the statute which prevents the agent of a surviving party from testifying to the transaction with the deceased”.

The citation of 21 A. L. R. 928 (1922) sustains this view.

In this case, however, the plaintiffs and Mr. Crafts expressly testified Mr. Crafts was not the agent of the surviv-

ing parties plaintiff, but claimed to be a friend of the decedent. Accordingly said rule is not applicable. We found no case sustaining the view that the "claimed agent" of a deceased party can testify adversely to his estate. We submit the rule of incompetency under dead man statute, and on other grounds heretofore argued should prevail; particularly in view of the situation that we have no way of checking the accuracy of the claimed agent when alone with the deceased. 70 C. J. page 348 N. 23, Whitaker v. Groover, Stubbs & Company 54 Ga. 174.

The cases and argument of respondents about declarations against interest of a grantor, do not fit the evidence in the case.

We submit the objections to the incompetency and hearsay conservations were well taken, and should have been sustained.

### REPLY TO "MISCELLANEOUS" ARGUMENT

The respondents say this is not a case "involving the right of a husband and wife, as between themselves, or one where a husband has made a property settlement with the wife or secured some most marital<sup>+</sup> agreement or make a settlement with the wife in anticipation of a divorce" (R. br. 37). We do not agree.

The testimony of Mr. Crafts regarding that contention is in part: "I asked her if she was willing to make a property settlement and then go ahead and file suit for divorce, so that he (Wilmer) would definitely know how much he had to pay her, how much property he had left. \* \* ." (tr. 194). "She said to me that the property settlement could be ar-

ranged without any difficulty \* \* ”. True, she was willing, if necessary, that all of their property go to care for Wilmer, even to the extent that she move out of the home so he could get the income therefrom; but Wilmer requested that she remain therein.

Mrs. Webb, in part, testified of Mr. Crafts’ conversation with her on March 15, 1946: “They wanted me to get a divorce, and wanted to know what I would take as settlement”. (tr. 31). “He finally asked me how \$500 would be as a settlement.” She didn’t know what the \$500 was to be for as she had refused to get a divorce (tr. 32-3).

We submit the great preponderance of the evidence is against the contention of the respondents that Mrs. Webb refused to stay with her husband and take care of him. When the question of care and maintenance of Wilmer Webb arose, he was then in the hospital on his death bed; five doctors were waiting upon him; he was needing blood transfusions; and the plaintiffs and Mr. Crafts then knew the disease would be fatal. It was but a play of words to talk of anything else but keeping him in the hospital where he could be cared for, until he could come home. A reference to:- letters of the parties between themselves, Exhibits “5”, “Y”, “3”, “A”, “E”, “R”; the events of March 14, 1946 in the office of Mr. Crafts; to the manner of taking his bonds, water stock, car certificate, and cash; the pittance of \$53.14 which Mrs. Webb received during January to July, 1946, inclusive out of the estate and property; the “fencing off” of Mrs. Webb from March 8, 1946 on; and the fact of Mr. Crafts’ speed and urgency in getting Mrs. Webb’s signature before she had time to get independent advice:- will all compel the view that the great preponderance of the evidence is against the find-

ings appealed from and against the argument of respondents on said issues.

We disagree with the respondents upon the question of the burden of proof of fair dealing in this case also:

“Where an old lady conveyed all her estate of \$40,000 or more to her best friend, in considration of the latter’s agreement to support her during life, in the grantor’s suit as an incompetent to set aside the conveyance, the burden of proof was on the grantee to show the absolute good faith and unquestioned fairness of the transaction.”

Rogers v Scott et al, 151 P. 379, syl. 1

To the same effect is the following:

“Dealings by a spiritual adviser with one who is without indebendent advice, and is about to die, and whose mind is impaired by a physical weakness, by which the adviser receives any advantage in the transaction between them, will be set aside as being contrary to the principles of equity, whether the benefit accrues to the spiritual advisers or to some other person who may have become the beneficiary through such influence.

Corp. of Latter Day Saints v. Watson, 25 U. 45 syl. 3; 69 P. 531.

California cases which respondents quote upon the sufficiency of the consideration, refer to an earlier California case of Parsons v. Cashman et al, 137 P. 1109 which is enlightening:

“The sufficiency of a purported or claimed consideration for a contract of the character under discussion must be determined from the facts of the transaction as they existed when the contract was made, rather than by subsequent developments. Such consideration, before it may be declared sufficient, must disclose not only a benefit conferred or agreed to be conferred upon the promisor, but must reveal as well some prejudice, detriment, or disadvantage suffered or agreed to be suffered by the promisee as an inducement for the promises which form the basis of the contract. C. v. Code, sec. 1605.”

The court then discusses the evidence, and points out that neither the contract nor the circumstances, expressly or impliedly, shows the promise of the diseased operated as an inducement to the plaintiff to relinquish, wholly or partly, anything of present or prospective value or advantage; and that in making the contract, nothing of value was abandoned, and that the obligation assumed by the plaintiff did not require him to abandon any particular position of present or prospective profit. Here was something to gain instead of something to lose.

The same is true of the facts in the case at bar. The plaintiffs did not change their position in any way; they rendered no care or attention after the purported contract which they had not rendered before; and they did not sign any writing or obligation by which any person could hold them to pay any obligations. The evidence shows they paid nothing.

After searching the authorities, no case has been found which upheld such a purported consideration.

In the cases cited by the respondents, there were writings marking the obligations of the persons receiving the property, made after careful and full advice when the owner of the property was well; and many independent witnesses appeared and substantiated the fairness and independent advice of the persons parting with the property. In the Johnson v. Studley case, 252 P. 638, Studley gave up the gainful occupation of a carpenter; and he and his wife took Bentson into their home and properly and carefully cared for him until he died. Such is shown by the many cases cited and referred to in 101 A. L. R. 1097-1106; and in each and all of them.

such elements are present which are not here present. The case of Long Beach Drug Co. v. United Drug Co., 88 P. (2d) 698, deals with the enforcement of a business sales contract, and does not approach the personal relations contract or case as does this cause.

We call the court's attention to the failure of the respondents to meet the argument that a widow and minor children of a decedent are his creditors under the law; that the transfers claimed to be valid by the respondents, in such event, left Wilmer Webb insolvent and unable to care for or maintain his family; and that the reasonable value of that support and maintenance would, up to date of this appeal, be more than \$1500.00. Finding "4", to which no exception was taken, is that Wilmer took the three minor children into his home, and they were supported by him and Mrs. Webb jointly.

"Where on stands in loco parentis to another, the rights and liabilities arising out of that relation are, as the words imply, exactly the same as between parent and child."

Sparks v. Hinckley, 78 U. 502 at p. 506; 5 P (2d) 570.

## ADMINSTRATRIX'S RIGHT TO AN ACCOUNTING

Plaintiffs fail to point out or refer to any evidence under which they claim "all Wilmer's property". They fail to point out or refer to any evidence to support such a claim. They fail to point out or refer to any purported settlement or accounting at the dissolution of the partnership, or at any time, or at all. There is no substantial evidence in the record to sustain such claims, or any of them. Wilmer Webb had a right to an accounting on or within a reasonable time after the 18th day of March, 1946. No accounting was made to

him, or claimed to have been made to him. No accounting has been made to his administratrix.

We deny that the record shows: "that Wilmer, with Margaret's full knowledge and consent, was turning all of his property to the plaintiffs in consideration of maintenance and support of Wilmer and the payment of his outstanding hospital, doctor and other indebtedness." We deny the record shows a purported transfer to the plaintiffs of title to Wilmer's car, his bonds, his water certificates, his hand tools, his personal belongings, and partnership animals, or any of them. We deny the record shows the consent of Margaret Webb to the transfer to the plaintiffs of any personal property of Wilmer Webb, or even any knowledge thereof, until after his death. We deny it shows a consent of Margaret Webb to the transfer of Wilber Webb's real estate on the basis claimed by the plaintiffs.

The bill of sale purports to transfer "all other livestock owned by me or in which I have an interest," whatever said disjunctive clauses mean. No reference is therein made to partnership animals. We maintain as heretofore argued, that the great preponderance of evidence shows no such agreement, no consideration for such claimed agreement, and no evidence of the transfer of "all the property" of Wilmer, and no transfer of his rights to such property.

Respondents are mistaken that the record is silent as to how the stipulation to which they refer was reached. The record on that is as follows:

"Udell R. Jensen, Attorney for defendant herein came before the court and objected to certain recitals in proposed findings submitted by plaintiffs herein. Thereupon a stipulation was agreed to and between counsel for



plaintiff and defendant, making certain changes in said proposed findings and decree.” (R. 360-361).

The announced decision of the court and the proposed findings of the court completely omitted four items on which no dispute existed. Counsel for the plaintiffs admitted several items were established in favor of defendants, and stipulated as to them, but no others. Said items were:

FIRST: Paragraphs 11 and 13 of their reply admit that Wilmer Webb was the owner of the guns and a pair of field glasses (R. 28).

SECOND: That on or about June 1, 1946, Spencer Webb received from the Oasis Seed Plant, Farmers’ Cooperative \$422.91 belonging to the partnership of Webb Bros., consisting of Wilmer Webb and the plaintiffs, which the plaintiffs appropriated to themselves (Ex. BB and tr. 235-6). It was this item on which the parties stipulated the administratrix was entitled to \$141.00, approximately one-third thereof.

THIRD: That the plaintiff, J. M. Webb, on cross-examination testified.

“Q. You think there is owing some money, owing to to the administratrix from the partnership of Webb Brothers?”

“A. Yes.”

“Q. How much?”

“A. About \$90.”

(tr. 157)

This was for the pellets and is the \$90 covered in the stipulation (tr. 157).

FOURTH: The record shows the plaintiffs put a padlock

on the barn (tr. 50). And off the record, it was conceded they took the grain which was Wilmer Webbs, as far as we can determine. The \$90 is for the value of his grain.

We deny that the stipulation was intended to cover "whatever assets might be due the administratrix of Wilmer Webb's estate". There is nothing in the stipulation to so show. The record establishes defendants were entitled to judgment for other items which were not conceded by the plaintiffs, not covered by the stiuplation, and on which no accounting was made.

Independent of the accounting which is due under the mortgage, and situation when the deed and bill of sale are set aside, the record shows an accounting is due from the partnership to the administratrix on the following:

(1) The status of the moneys received and expended by J. M. Webb and Spencer Webb for the partnership over three years prior to, and at the time of, dissolution of the partnership; and the accounts kept by them

(2) The \$445.57 which the plaintiffs took for themselves from the partnership funds on March 14, 1946 (last check Ex. "U"; tr. 227, 249-50).

(3) The shortages of \$1923.72 from moneys of the partnership received by the plaintiffs from sale of seed between April 13, 1944, and February 7, 1946. (Ex. "DD", "H", and "I"; A. br. p. 62-3).

(4) The disposition and ownership of the 120 head of cattle assessed to "Webb Bros." by the County Assessor on January 1, 1946, and of which the explanation by the plaintiffs

was completely a "hedge" and unsatisfactory (tr. 115-18. 157-67).

(5) All of the hay and feed the partnership raised during the cropping season of 1945 which plaintiffs admitted to be partnership feed, but claim was fed to their cattle (tr.157-67).

### CONCLUSIONS

Accordingly, we submit the views set out in our brief on appeal should be adopted.

Respectfully submitted this 9th day of February, A. D. 1949.

JENSEN & JENSEN

Attorneys for Defendants and Appellants

Received copy this \_\_\_\_\_ day of February, A. D. 1949.

---

Attorneys for Plaintiffs and Respondents