

1949

Jerry Sine and Dora Sine v. Mildred Iona Harper : Brief of Respondents

Utah Supreme Court

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Richards and Bird; Attorneys for Respondents;

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IN THE

Supreme Court

OF THE

State of Utah

JERRY SINE and DORA A. SINE,
Respondents,

vs

MILDRED IONA HARPER, Admin-
istratrix of the estate of Cathrine
Jensen, deceased,
Appellant.

CASE NO.
7386

BRIEF OF
RESPONDENTS

FILED

OCT 13 1919

RICHARDS AND BIRD
Attorneys for Respondents

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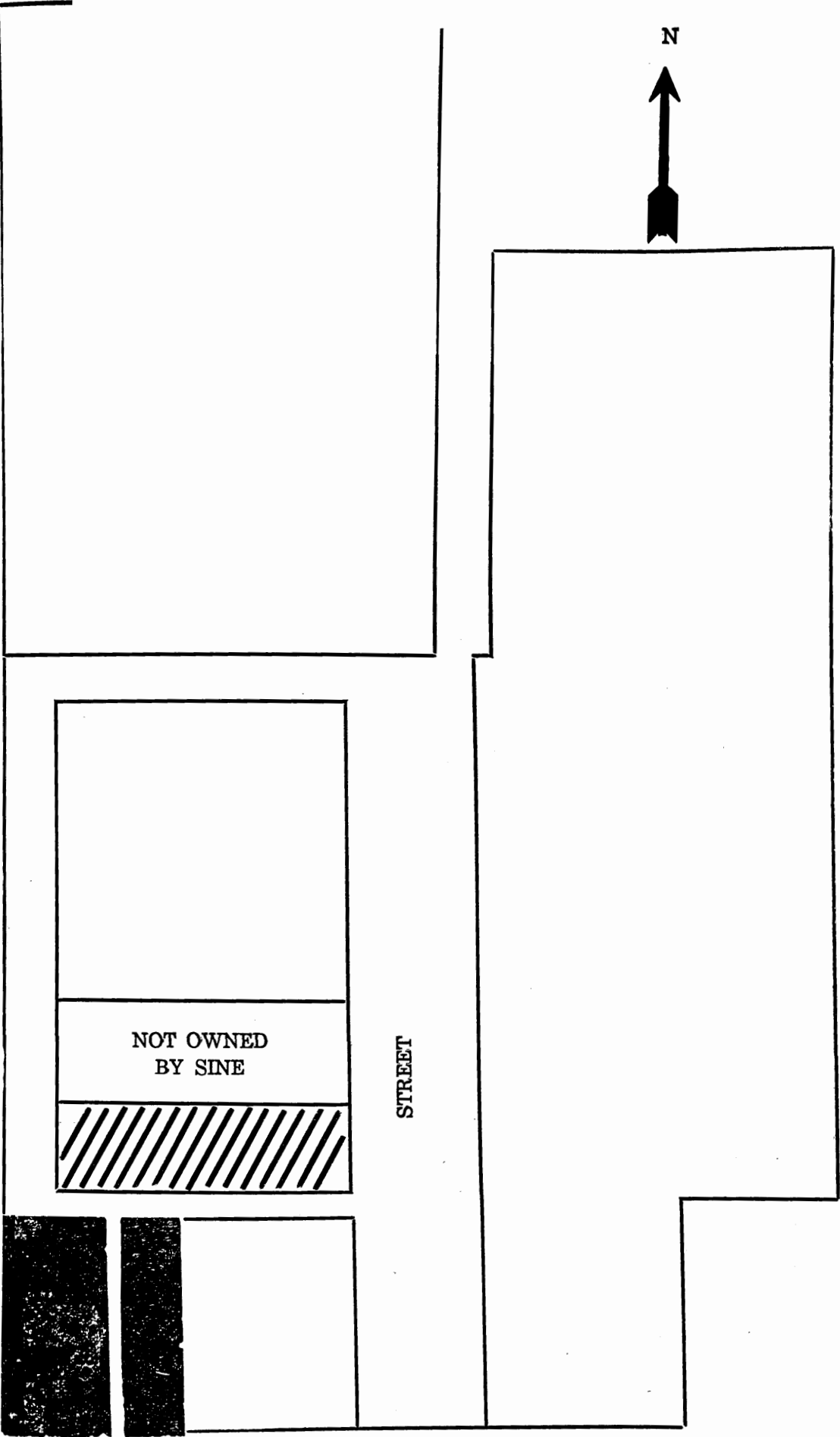
STATEMENT OF FACTS

Since the statement of facts in the brief of appellant does not comply with Rule VIII, sub-paragraph 1, of the rules of the Supreme Court, respondents request that the said statement of facts be ignored by this Honorable Court. Rather than attempt to correct that

statement and supply transcript references to support the changes, we restate the facts of the case, supported by references to the transcript, as required by the rules.

The respondents purchased a large tract of land in Block 61, Plat "C", Salt Lake City Survey, a portion of Salt Lake County, in February 1946 (R. 48, 53, Exhibit B). One additional parcel was purchased in the spring of 1947 which completed respondents' ownership of all the south property in Block 3 except for the tract involved in this litigation and one other (R. 55). Exhibit B is a plat of this property, which in outline is reproduced here. All of the open area was purchased in 1946, the shaded area was purchased in 1947, and the property in dispute is shown in black.

The respondents engaged a real estate agent, Mr. Dowell, "to purchase the property west of my property, the corner property, so that I could square my property that was in the rear" (R. 64). Mr. Dowell testified that he was engaged to purchase "the property including the duplex adjoining his auto court" (R. 108). Mr. Dowell determined that Cathrine Jensen owned the property and contacted her at her residence on 8th South in Salt Lake City, telling her he was a real estate agent, and: "I understand you own some property on West North Temple adjoining the Bishop's Auto Court." She replied that she did and there was a discussion of price and Mrs. Jensen asked who wanted to buy it. Mr. Dowell replied, "The man who owns the auto court next to it, Mr. Sine," and Mrs. Jensen replied that, "He



NORTH TEMPLE

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should pay more for it.” (R. 117). At a later conversation between Mr. Dowell and Mrs. Jensen there was a further discussion concerning the price and Mr. Dowell said, “The fact remains, you are getting more than \$100 a foot for it. This buyer is going to tear the house down anyway,” and advised her that a tract down the street had been sold for \$85 a foot (R. 121).

Mr. Dowell later testified that on the occasion of his first visit he advised Mrs. Jensen that the property was more valuable to his client than to anyone else and “that is the main reason he is paying \$8,000. The main reason is to straighten this out. However, he has in mind building a cafe there” (R. 194). And Mrs. Jensen replied, “Well, I have had in mind doing something of that nature myself, if my health permitted or if I had somebody to entrust it to whom I could rely upon. I still might do that. * * * * The children don’t want me to sell it but I am glad to be free of it for the reason that I just can’t take care of it” (R. 195).

Exhibit C was executed by the respondents and then by Mrs. Jensen (R. 62, 110), and subsequently Exhibit D was executed, first by the respondents (R. 71, 122). Both testified that they did not read the document (R. 82, 90, and 97). Mr. Sine testified that he relied upon his realtor and his attorney to protect him. (R. 72, 73, 82, 90, and 92), and both testified that they thought they were buying the property adjoining theirs and would not have signed Exhibit D had they known that a 25½ foot strip was being omitted (R. 79, 82, and 98).

Mr. Sine testified that the entire 75 feet had been used together, the vacant $25\frac{1}{2}$ feet for the parking of cars, dumping of refuse, and stringing of clotheslines for the benefit of the occupants of the duplex (R. 58, 61, and 62). Mrs. Sine and Mr. Dowell testified to substantially the same thing (R. 99 and 196). Nothing separates the two tracts (R. 50, 76, 169, and 176). The sewer plug for servicing the house is on the $25\frac{1}{2}$ foot strip (R. 49, 61-62) and a little way into the vacant piece (R. 49, 87). Mr. Sine testified that after the contract here involved was entered into he took possession of the entire tract, removed the rubbish, removed the shed from the property, and continued to use it to park cars both for occupants of the duplex and for other guests of the motor court (R. 74, 75, 77, and 83). Mr. Sine learned that Exhibit D covered only $49\frac{1}{2}$ feet on July 24, 1948 (R. 80). It appeared in testimony that Mrs. Jensen paid taxes on the $25\frac{1}{2}$ -foot strip on November 24, 1947, and it must therefore be assumed that she was aware of the description in Exhibit D on that date (R. 186).

Mr. Dowell testified that he obtained an abstract from Mrs. Jensen (R. 123) and from it a stenographer in his office prepared Exhibit D (R. 133). This abstract was apparently Exhibit 1, and Mr. Dowell testified that he assumed he referred his secretary to page 61 of the abstract since that page is a deed to Cathrine Brady (R. 139-140). He testified that he knew the tract he was attempting to buy was more than $49\frac{1}{2}$ feet and that if he had noticed the description of $49\frac{1}{2}$ feet he would have

known it was erroneous (R. 141). The plat of property in the front of Exhibit 1 shows the entire 75 feet for which respondents were negotiating as a unit and the later entries in that abstract show a division of the property into 49½ feet and 25½ feet. Mr. Dowell testified that the property was over-priced at \$8,500 on the assumption that the entire 75 feet was being purchased (R. 141).

The appellant offered testimony from the daughters of the deceased Cathrine Jensen, the husband, and the former husband of the deceased as to her state of mind and her intentions, based upon purported conversations with them, all of which were in September 1947 or later, except the conversation with Mrs. Wheeler, purporting to have taken place on the date the earnest money receipt, Exhibit C, was signed (R. 210-211) and one with Mrs. Freeman soon after the sale. (R. 171). Mrs. Wheeler's testimony was that after the conversation between Mr. Dowell and her mother, her mother told her that the people who owned the tourist court wanted to buy her property and the mother suggested they go up to look at it, and after they arrived at the property this statement was made, according to Mrs. Wheeler:

“A. Well mother, she said, ‘They are not buying all of this.’ She said, ‘They are buying this that the house is on’, and showed me what it was and I asked her why she wasn’t selling the other twenty-five feet and she said, ‘I didn’t buy that with the place and I am not selling it with

the place.' She said she wanted to put a hamburger stand some place on it and she said, 'I am not selling the place.' '' (R. 210-211)

Mrs. Wheeler did not know what papers had been signed at that time but her mother said she "had sold it" and that was all (R. 211).

The appellant, another daughter of Cathrine Jensen, testified that there had never been any buildings on the 25½ foot strip or any clotheslines (R. 158). She testified to a conversation with her mother in October 1948 in which her mother wanted her father (Mrs. Jensen's first husband, C. W. Biddinger,) to build a three- or four-room house on the property (R. 152). And in the fall of 1947 Mrs. Jensen indicated that she wanted Mr. Biddinger to build a hamburger place or lunch stand on the property (R. 156).

Another daughter, Mrs. Freeman, also testified that there were no clotheslines or sheds or outbuildings on the 25½ foot piece of property (R. 169), and testified that she discussed that piece of property after the transaction with Mr. Sine right after the property had been sold, and:

"A. Mother said I could go ahead and use the twenty-five and one half foot piece and my father could build us a little hamburger place and little lunchstand and she thought he was a good cook and he could cook and I could help him. She said that would be adequate, it would be plenty large for a little five cent place and since there

was tourist cabins around there and she thought that would be a nice place and I mentioned that to Mrs. Sine * * * '' (R. 172).

Mrs. Freeman also testified that in June 1948 her mother told her that if her father did not want to build a lunchstand he could build a little home on the North Temple property (R. 173-174).

Mr. Biddinger, the first husband, testified to a conversation in September 1947 in which Mrs. Jensen indicated she wanted him to build a hamburger stand on the property (R. 179) and that in June 1948 she indicated a desire to have him build a little house on the same piece (R. 180).

James C. Jensen, the husband of Cathrine Jensen, at the time of the sale here involved, testified that after the transaction with Mr. Sine Mrs. Jensen talked of letting Mrs. Freeman and her father build a hamburger stand on the property (R. 185); also, that on November 24, 1947, Mrs. Jensen paid the taxes on the 25½ foot strip (R. 185). Before the sale involved here, Mrs. Jensen had talked of building some cabins on the 25½ foot strip (R. 184).

CROSS-ASSIGNMENT OF ERROR

1. It was error for the Court to admit testimony of conversations with the deceased Cathrine Jensen occurring long after the sale to the respondents.

2. It was error for the Court to admit testimony

of conversations with the deceased shortly after the time of sale to the respondents.

3. It was error for the Court to refuse to strike the testimony of Mrs. Harper of conversations with the deceased after the sale (R. 152-153).

ARGUMENT

We will argue, first, our three cross-assignments of error and will then argue the five points discussed by the appellant in her brief.

I.

IT WAS ERROR FOR THE COURT TO ADMIT TESTIMONY OF CONVERSATIONS WITH THE DECEASED CATHERINE JENSEN OCCURRING LONG AFTER THE SALE TO THE RESPONDENTS.

Logically, our cross-assignments of error should be argued after the assignments of the appellant. They are argued first in this brief so that the Court will understand the nature of the testimony upon which appellant relied in defense, so that under point V of the appellant's argument (point VIII of this brief) the Court can exclude from consideration evidence which was properly inadmissible and it can therefore be ignored in resolving appellant's point V.

Appellant's testimony of conversations with the deceased occurred in September 1947 or later, except that Mrs. Freeman testified to a conversation "right after"

the property had been sold (R. 171) and Mrs. Wheeler testified to a conversation apparently on the date the earnest money receipt was executed (R. 210). With these two exceptions, testimony as to conversations with the deceased was remote from the transaction involved in this litigation and not shown to have been safeguarded by admissions against interests or spontaneous exclamation, or otherwise. All of the statements are plainly self-serving and Mrs. Wheeler's could not have been more to the point from the standpoint of the appellant if the deceased had dictated it after the filing of the lawsuit and as a means of establishing her defense.

At the time the first witness offered to testify concerning a conversation with the deceased, the Court expressed doubt as to its admissibility (R. 150) but Counsel for the appellant argued that the testimony was similar to some already offered by the respondents (and now strenuously objected to under point IV of appellant's argument), as though that were a reason for admissibility (R. 150).

It is fundamental that self-serving declarations are not admissible. *Salt Lake Brewing Co. v. Hawke and Andrews*, 24 Utah 199, 208, 66 P. 1058; *Clayton v. Ogden State Bank*, 82 Utah 564, 567, 26 P. 2d 545; *Jones Commentaries on the Law of Evidence*, page 1636; 31 C. J. S. 948.

Salt Lake Brewing Co. v. Hawke and Andrews (supra) was an action against two partners for money loaned by the plaintiff. One partner obtained the money

and absconded and the question was whether the absconding partner had authority to receive the money for the partnership. Testimony was received that the innocent partner, after learning of the loss, had stated that it was not his responsibility. The Court said:

“We are of the opinion that the admission of this testimony was prejudicial error. It was already hearsay, and the statement of the defendant Andrews at that time, after he found that there would be an attempt made to hold him liable for the money borrowed by his partner, was simply a self-serving declaration, and was not admissible for any purpose.”

Clayton v. Ogden State Bank (*supra*) was an action against an administrator for the value of services rendered. This Court held that plaintiff's testimony of a letter sent by him to the deceased was properly excluded:

“ * * * * Exhibit A, the letter from plaintiff to deceased, is purely a self-serving document and aside from the effect of the statute or other connecting evidence was properly rejected by the trial court.”

The fact that Cathrine Jensen was deceased does not make her extra-judicial utterances admissible:

“The mere fact of death, alone, does not render competent self-serving conduct, admissions or declarations of the deceased person during his lifetime.” Jones Commentaries on the Law of Evidence, page 1642.

“The death of the declarant does not render his self-serving declarations admissible, except in jurisdictions where the rule has been changed by statute. ” 31 C. J. S. 953.

The annotation to this statement includes cases from 27 jurisdictions, but none from Utah. Without presuming to know upon what theory the appellant offered this testimony, we suggest that the most plausible theory was under the “Res gestae” exception to the hearsay rule. With the exception of the two conversations indicated, this theory is too far-fetched to deserve comment, and we therefore consider this possibility under our point II.

II.

IT WAS ERROR FOR THE COURT TO ADMIT TESTIMONY OF CONVERSATIONS WITH THE DECEASED SHORTLY AFTER THE TIME OF SALE TO THE RESPONDENTS.

The testimony of Mrs. Freeman was that her conversation with her mother took place right after the property had been sold but that it took place at her own home, and there is no indication that this conversation was the same day, or even the same week (R. 171). Less remote was the conversation to which Mrs. Wheeler testified. This one took place sometime after the conversation between Mr. Dowell and Mrs. Jensen and after Mrs. Wheeler and her mother, according to the testimony had driven to the property on North Temple

Street from 8th South (R. 209-211). Were the circumstances such as to permit the Court to receive this testimony under this exception to the hearsay rule?

Little would be accomplished by an attempt to examine into the reasons for the *Res gestae* exception to the hearsay rule. This aspect of the problem has been before the court, as evidenced by Mr. Justice Wolfe's special concurrence in *State v. Rasmussen*, 92 Utah 357 at pages 372 to 374. The difficulties of the doctrine are discussed by both Jones and Wigmore in their works on evidence. We assume that the exception is well-established and that the reasons for its existence are sufficient, and simply inquire into the decided cases in asking this Court to rule on the testimony received in this case.

Jackson v. Utah Rapid Transit Co., 77 Utah 21, 37 to 40, 290 P. 970, was an action for personal injuries in which plaintiff obtained a judgment. Plaintiff offered testimony of statements of defendant's motorman to the plaintiff, her husband, a policeman, and in reporting the accident over the telephone. On appeal this Court said, at page 37:

"It is urged that the statements or declarations made by the motorman to the husband, to the plaintiff, and to the policeman, were improperly received in evidence. Such testimony was received under the *Res gestae* rule."

In sustaining the lower court in receiving this testimony,

this Court laid down the tests which should be observed, as follows:

“In view of such considerations we think the statements or declarations made by the motorman to the husband, to the plaintiff, and to the policeman were properly received in evidence. They were made so nearly coincident with the collision—within three or four minutes thereafter—and so closely connected with and related to it and tended to explain or elucidate it, and made under such circumstances as to preclude premeditation or design in the making of them, and sufficiently shown to have been the result of the immediate and present influences of the transaction or preceding circumstances to which they related as to render them admissible in evidence. The statements were in no sense self serving. While declarations made for or against one party or the other to a cause is not itself a determining factor of their admissibility and to be admissible it is not essential that the declarations be disserving if they otherwise have the requisites rendering them admissible under the rule, still, declarations which are disserving, as here they were, are more likely to be instinctive and spontaneous and not the result of premeditation or design, than declarations which, if made under other circumstances, may be self-serving. As stated in the Cromeenes Case, the basis of the rule is not admissions against interest, but trustworthiness of the statements, provable, not as the testimony of the declarant, but as a part of the transaction itself, like any other material fact or evidentiary detail.”

As to the telephone conversation, this Court held

that it should have been excluded upon this reasoning:

“The admission in evidence as to what the motorman stated while talking over the telephone stands on a somewhat different footing. As to the question of time there was no substantial difference as to that statement and the other statements, but the character of the statement and the circumstances under which it was made were materially different. The statement over the telephone was more in the nature of making a report, the witness who testified concerning the making of it not knowing whether the statement was made to some one in the defendant’s office or to some one at the police station; but in either case, the motorman was merely reporting or giving notice of an accident. Such a report or statement in the very nature of things is not instinctive or spontaneous though made within four minutes or thereabouts after the accident. What prompted or induced the statements made to the husband and the plaintiff was wholly different from that which prompted or induced the statement over the telephone. We thus think the statement made by the motorman over the telephone was improperly received.”

The principles of this case were followed in *Balle v. Smith*, 81 Utah 179 at 198, 17 P. 2d 224, where, after quoting from *Jackson v. Utah Rapid Transit Co.*, the court said:

“The declaration offered meets the requirements of this rule, and should have been admitted. It was made within a very few minutes after the

collision and before any of the parties concerned had left the scene of the accident, so as to be contemporaneous within the rule announced in the Jackson Case. It was closely connected with and related to the accident, and tended to explain and elucidate it. It was made under circumstances which indicate its spontaneous character and to preclude premeditation or design or opportunity for reflection, and is sufficiently shown to have been the result of the immediate and present influences of the collision. The nature of the occasion was such as to cause shock and excitement, and to render utterances within a few minutes by those concerned in the accident as spontaneous and unreflecting. The declaration, though subsequent by a few minutes, was yet near enough in time to allow the assumption that the exciting influence continued.”

And, again, in *State v. Rasmussen*, supra, 92 Utah 357, 68 P. 2d 176, the circumstance out of which the declaration arose was an automobile accident. This was a prosecution of a hit and run driver and holds that the trial court has some discretion in the admission of declarations as part of *Res gestae*. In that case, one Maloney testified as to the death of his companions and his presence at the scene of the accident. The defendant offered testimony of one Zackerson—that he arrived at the scene of the accident apparently before anyone else and while Maloney was still excited and was still near the body of one of his companions and asked Maloney how it happened. The trial court refused to let him answer. The Supreme Court said, at page 361:

“Had it been shown that the utterances offered to be proved were spontaneous, made under stress or the excitement of the occurrence, the proffered proof might have presented a different question. Nothing appears as to how soon after the alleged accident occurred the statements were made. The declaration offered may have been made within a very few minutes after the accident or so closely contemporaneous with it as to come within the rule laid down by this court in the case of *Balle v. Smith*, 81 Utah 179, 17 P. (2d) 224, at page 232 of the Pacific Reporter. It must be recognized that the trial court has some discretion in the admission of declarations of this character when the declarations are not immediate, spontaneous, or made under stress of excitement. The court should be fully satisfied by the evidence that a statement claimed to be *res gestae* comes within the rule and meets all the requirements. It is not clearly apparent in the instant case that the declaration made meets the requirements of the *Balle v. Smith*, *supra*.”

The concurrence of Mr. Justice Wolfe in this case cautions that the tests to bring a declaration within this exception are spontaneity, absence of reflection, and the automatic nature of the declaration, and that the discretion of the trial court lies in determining whether these tests are satisfied.

A later, but similar, Utah case is *Morton v. Hood*, 105 Utah, 484, 143 P. 2d 434.

Wigmore states in Section 1749 of his Third Edition of Evidence that this exception to the hearsay rule, as

are all others, is supported by a circumstantial probability of trustworthiness. Spontaneousness gives the probability of trustworthiness to these declarations. Wigmore says:

“This circumstantial guarantee here consists in the consideration, already noted, that in the stress of nervous excitement the reflective faculties may be stilled and the utterance may become the unreflecting and sincere expression of one’s actual impressions and belief.”

And in the succeeding section Mr. Wigmore comments on the requirements that there be a startling occasion, a statement made before there has been time to fabricate and that it relate to the circumstances of the occurrence.

The facts testified to by Mrs. Wheeler are that on the day of Mr. Dowell’s second conversation with her mother and after that conversation (which Mr. Dowell said was quite lengthy (R. 121), Mrs. Jensen suggested that they take a ride over to the North Temple property (R. 209). After they arrived there Mrs. Jensen without any explanation of why any question was raised as to what was covered by the contract she had just executed, proceeded to give a self-serving statement of what was in the document and what was not intended to be covered by the document. There had been much more elapsed time than the usual three or four minutes found by this court to be sufficient, there was no showing that Mrs. Jensen was excited or that she was acting without op-

portunity to deliberate and to accomplish a purpose with her declaration.

Of course, the trial court did not believe the daughters of the deceased and this assignment of error becomes important only in the event this Court should order a new trial, and in that event, it would be a guide on the next trial. It will be referred to again under Point VIII of this argument.

III.

IT WAS ERROR FOR THE COURT TO REFUSE TO STRIKE THE TESTIMONY OF MRS. HARPER OF CONVERSATIONS WITH THE DECEASED AFTER THE SALE (R. 152-153).

No special point is made of this assignment of error. The court was doubtful whether this testimony was admissible and suggested that counsel for respondents make a motion to strike if he deemed the evidence inadmissible. This motion was made at a proper time and was denied by the court (R. 152-153). This was error in the same manner as the original ruling over respondents' objections was error.

IV.

THE COURT ERRED IN PERMITTING HEARSAY EVIDENCE OF THE STATEMENTS OF PLAINTIFFS TO THEIR AGENT CONCERNING INSTRUCTIONS TO PURCHASE THE 25½-FOOT

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IV.

THE COURT ERRED IN PERMITTING HEARSAY EVIDENCE OF THE STATEMENTS OF PLAINTIFFS TO THEIR AGENT CONCERNING INSTRUCTIONS TO PURCHASE THE 25½-FOOT

TRACT, AND IN FINDING THAT SUCH WERE THE INSTRUCTIONS AND THAT PLAINTIFFS INTENDED TO PURCHASE THE SAID 25½-FOOT TRACT. (Appellant's point I)

Having in mind all that has gone before, respondents contend that the testimony of respondent Sine and of the agent Dowell, set forth at page 19 of appellant's brief, was properly admitted as a verbal act creating the agency between them. It was necessary for the respondent to show agency and that Dowell was authorized to convey to the deceased the state of mind and intention of the respondent and also because there was a question as to whose agent Mr. Dowell was. The appellant contended that Dowell was the agent of the deceased (R. 111, 114) and the respondents contended that Dowell was their agent (R. 111, 112), and the court made finding of fact number 5 on this issue (R. 37). Under these circumstances, the testimony was properly received.

On this question, in *Wisconsin Orange Crush Bottling Co. v. Meicher*, 198 Wis. 461, 224 N. W. 702, the question of agency was in dispute and testimony had been received as to the terms of that agency. At page 704 of 224 N. W., the Wisconsin Supreme Court said:

“It is strenuously objected that the testimony given by Charles Meicher as to his conversation with Bumpus and detailing the extent of the agency was not competent upon the general ground that they were self-serving declarations. We are cited to no cases sustaining such a prop-

osition. What Meicher testified to was the arrangement between him and Bumpus. That a principal may not testify to the terms of the contract made by him with an agent is certainly a novel contention. How else would the contract of agency be established? The burden was upon Paull to establish the fact of agency, which he endeavored to do by inference."

See, also, *Rice and Bullen Maulting Co. v. International Bank*, 185 Ill. 427, 56 N. E. 1062; *Stevick v. Vennum*, 227 Ill. App. 86; *Wigmore*, Vol. 6, page 200, quoting *Roebke v. Andrews*, 26 Wis. 311, 321.

A similar Utah case is *Webb and Webb v. Webb*, et al, (decided August 1949), 209 P. 2d 201, in which an attorney at law was called to testify concerning the meaning and purpose of written documents, including a deed and a check. The testimony was admitted by the trial court and in upholding the ruling this Court said:

"The conversations objected to as heresay were not used to prove facts therein asserted to exist but the fact whether such conversations occurred were material issues in the case. The conversations between the attorney and the decedent show the attorney's authority and the purposes and limitations of such authority. The conversations between the attorney and respondents showed negotiations for and the consummation of a deal with respondents in accordance with the attorney's authority. There was no assertion by an extra-judicial witness of a material fact for the purpose of proving the existence of such

fact, but the fact that such conversations occurred were circumstances which showed the purpose and intention of decedent to convey to the respondents unconditionally. The attorney was the one who acted for the decedent in the transactions involved herein and his evidence was competent to relate his version thereof and a relation of the conversations he had with the principals in the transaction was not hearsay, even though it necessarily included statements made by the other parties to the conversation which were not made in the presence of appellant.”

Although the testimony was offered upon the theory of creating agency (R. 64-66), it was probably admissible to show the state of mind of respondent Jerry Sine, which was a material issue in the case. Such testimony was received and approved by this Court in *Butterfield v. Consolidated Fuel Co.*, 42 Utah 499, 132 P. 559; *Mower v. Mower*, 64 Utah 260, 268-269, 228 P. 911. Appellant might argue that this latter case supports the declarations of the deceased as testified to by her daughters. The case is distinguishable on two important grounds: (a) The declarations in this case are self-serving and were not such in the *Mower* case; and (b) the declarations in the *Mower* case, although given after alleged completion of the alleged transaction, were admissible because the existence of the transaction, i.e., delivery of the deed, was an issue in the case. In the case at bar there is no issue as to whether a contract was made, and evidence subsequent to the making of it becomes self-

serving. Testimony offered by respondents concerns state of mind before contracting, as well as being part of a verbal act; testimony of the appellant concerns state of mind after contracting.

V.

THE COURT ERRED IN ADMITTING ANY TESTIMONY THE EFFECT OF WHICH WAS TO VARY THE TERMS OF THE WRITTEN UNIFORM REAL ESTATE CONTRACT. (Appellant's point II)

Respondents humbly suggest that appellant has misconceived the meaning of Section 104-48-15, U. C. A. 1943, which is the parol evidence rule. It is not applicable to this case because the documents themselves were put in evidence, thereby satisfying the parol evidence rule. And that parol evidence cannot be received to vary the terms of a written instrument is not applicable to suits in equity for reformation of written contracts. *Walden v. Skinner*, 101 U. S. 597, 25 L. Ed. 963; 45 Am. Jur. 650.

VI.

THE COURT ERRED IN FINDING AND DECREERING THAT THERE WAS A CONTRACT FOR THE SALE AND PURCHASE OF THE 25½ FOOT TRACT OF LAND NOT DESCRIBED IN THE WRITTEN UNIFORM REAL ESTATE CONTRACT AS SUCH CONTRACT IS WITHIN THE STATUTE OF FRAUDS. (Appellant's point III)

It cannot be argued successfully that the written documents in this case do not satisfy the statute of frauds. Appellant does not so contend under her Point III. Her argument apparently is that respondents seek to establish an agreement different from one reduced to writing. This, of course, is the essence of suit for reformation of a contract and the statute of frauds has been held to be no obstacle. 86 A.L.R. 448, at page 450, thus states the general rule:

“It is well settled by the weight of authority that the Statute of Frauds does not prevent the reformation of a deed so as to enlarge the property or interest conveyed.”

VII.

THE COURT ERRED IN PERMITTING THE WITNESS, DOWELL, TO TESTIFY TO CONVERSATIONS AND NEGOTIATIONS WITH CATHERINE JENSEN IN VIOLATION OF SECTION 104-49-2(3), UTAH CODE ANNOTATED 1943. (Appellant's point IV.)

Appellant's brief at page 27 notes a split of authority on the question as to whether or not the statute applies to the testimony of an agent for the party who sues the deceased's representative. We agree with appellant's statement on that page, that this Court has never ruled on this precise question.

At page 35 of her brief, appellant refers to the

statement at 70 Corpus Juris 266, and states that “possibly the weight of authority” permits an agent of the surviving party to testify as to transactions with the decedent.

The cases cited by the appellant in this section of her brief do not involve any statute like the Utah statute, and Jones in his *Commentaries on Evidence*, at pages 4247 to 4248, says that there are so many different dead man’s statutes and such conflicting rulings between the states that precedents in one state are of very little value in other states.

The question under our statute is whether an agent of the surviving party is a “person directly interested” in a suit against the estate of a deceased person. This suit was not started against a representative of the deceased person but against the vendor herself, and it is no fault of the respondents that Cathrine Jensen died without having her deposition taken, any more than it is the fault of the appellant. The statute seems to suggest no distinction between an action brought against a representative of a deceased person and a suit where such representative is substituted after the action is commenced; but the argument about sealing the mouths of witnesses when the mouth of the deceased is sealed by death does not apply so strongly where the parties in good faith have commenced a suit against a vendor who would apparently be free to testify to the transactions at the trial.

The question involved in this case was annotated

at 21 A. L. R. 928, and Subdivision III, annotates this question "under provision disqualifying party in interest." Our statute states a "person" instead of "party" but requires "direct" interest and the annotation subheading does not. The annotation states the rule that "in construing this provision it is generally held that an agent of the surviving party is not a party in interest, within the meaning of the statute, and so is not incompetent to testify as to transactions had with the deceased." No Utah cases are listed and neither are there any cases from California, Idaho or Montana, whose statutes are like ours, according to the reference following Section 104-49-2, U. C. A., 1943. The supplemental annotation at 54 A. L. R. 264 confirms the general rule, but likewise contains no cases from any of the four states, and neither do the supplemental annotations. We have likewise examined the references in the American Digest System under Key No. 140 (16) under the title, *Witnesses*, and have found no decision from any of these four states.

Appellant relies on a Missouri case which deals with a party to the contract and the annotation at 21 A. L. R., page 927, establishes this as a separate digest heading and as not contrary to the general rule referred to under Subdivision III. Numerous Missouri and some other cases are cited in the annotation, which respondents submit are not in point. And, in any event, appellant's two cases, relied on at pages 28 and 29, have been overruled, *Banking House of Wilcoxon v. Road by Wag-*

ner v. Binder, 187 S. W. 1128 (see 21 A. L. R. at 938) and Taylor v. George by Allen Estate v. Boeke, 254 S. W. 858 and Curtis v. Alexander, 257 S. W. 432 (see 54 A. L. R. 265-266).

Appellant argues that the agent Dowell had some motive to falsify and therefore should have been disqualified as a person interested in the event of the suit. The testimony from R. 153 is shown at pages 31 and 32 of appellant's brief. Dowell testified that he was not concerned about collecting his commission as he had a note for that but that he was interested in seeing Mr. Sine prevail because he feels that he fell down on the job. Appellant tries to convert this into an interest in the outcome of the action by arguing that perhaps the respondents would have a suit against the witness Dowell if they lost this suit. That is, of course, highly conjectural and no judgment in this action would be binding on the respondents or Dowell in an action against him, and what evidence there might be to support such an action is purely speculative and was not gone into in this trial. And on this question two cases from other jurisdictions seem helpful.

In Johnson v. Matthews, 301 Ill. App. 295, 22 N. E. 2d 772, a real estate broker testified against the estate of a creditor in a transaction that he was personally interested in the success of the debtor for whom he testified. The trial court refused to admit the testimony and found for the creditor against whom the broker was

willing to testify. The appellate court, in reversing this judgment, said:

“The interest which disqualifies a witness from testifying against an administrator must be an actual financial interest that will result in pecuniary gain or loss for the witness. It has nothing whatever to do with his understanding or feeling. This has been held in many cases in this and other states.”

The Illinois Statute, Ill. Ann. Stat. C. 51 Sec. 2, concerns a “person directly interested in the event thereof” in the exact language of our statute.

And in *re Hilbert's estate*, 14 Wash. 475, 128 P. 2d 647, it was held that an attorney could testify against the estate of a decedent and in behalf of his client, although he testified that the amount of his fee had not been fixed and that it depended in part on the outcome of the suit and that if his client was successful his fee would be larger. The court held that the attorney's testimony was properly received, relying on an earlier Washington case, *Swindler v. Daniels*, 123 Wash. 409, 212 P. 2d 29. The statute being interpreted was Remington's Revised Statutes, Section 1211, which provides that a “party in interest” is incompetent to testify.

The Utah case of *Burnham et al. v. Eschler* (June 29, 1949), 208 P. 2d 96, seems to support the testimony of the real estate agent in this case inasmuch as the motive to falsify and the interest of the witness appear to have been stronger in that case than in the case at

bar. The question in the Burnham case was whether a deed executed by the deceased in her lifetime had been duly delivered to her daughter with the intention that the daughter hold title to the property. The husband of the donee was permitted to testify to conversations with the deceased, which was assigned as error in this court under the claim that the husband was a party directly interested in the event of the action. On this question the court, at page 101 of the Pac. Rep. Advance Sheets, Vol. 208, said:

“If Mr. Eschler had a direct interest, it was an interest in the transaction testified to, and not in the event of this action. In the annotation at L. R. A. 1917A 32, cases are cited holding that the interest in the action must be pecuniary, direct, immediate, and not uncertain, contingent or remote, and that a husband is not incompetent because he may become a beneficiary under his wife’s will or succeed to her property by her intestacy. We held in *Olson v. Scott*, 61 Utah 42, 210 P. 287, that the plaintiff’s husband was entirely competent to testify as to statements made by the plaintiff’s deceased mother to the effect that certain bank deposits belonged to the plaintiff. *Mower v. Mower*, 64 Utah 240, 228 P. 911, and the general rule on this point as stated in 58 Am. Jur. 195, Sec. 319, are in accord with this result. See also *Clawson v. Wallace*, 16 Utah 300, 52 P. 9.”

To the same effect is *Maxfield v. Sainsbury*, 110 Utah 280, 172 P. 2d 122.

And so in the case at bar the testimony of the witness Dowell, that he wanted the respondents to succeed because he had fallen down on his job of representing them, should be taken into account by the court in view of all of the other facts, including the fact that his commission was fixed by a note and that he stood to make no gain financially by the outcome of the suit. Upon the reasoning of the court in *Burnham v. Eschler*, above noted, and stated by Mr. Justice Wade in his concurring opinion, this court should uphold the trial court in permitting the witness Dowell to testify.

VIII.

THE COURT ERRED IN ITS FINDINGS OF FACT, CONCLUSIONS OF LAW AND DECREE OF REFORMATION, BECAUSE THERE IS NO CLEAR AND CONVINCING EVIDENCE OF A MUTUAL MISTAKE IN THE EXECUTION OF THE UNIFORM REAL ESTATE CONTRACT. (Appellant's point V.)

Appellant asks this court to reverse the trial court on the ground that the evidence was not sufficient to support the judgment. Appellant states the rule to require evidence which is clear, satisfactory, and convincing. This is the rule stated in *Forrester v. Cook*, 77 Utah 137 at 145, 292 P. 206, which case is discussed by appellant at page 52 of her brief. After using the above words and noting that a bare preponderance of

the evidence is not sufficient, the court adds, "unless a fair preponderance of the evidence clearly and satisfactorily convinces the court of the error." Respondents believe that the evidence was clear, satisfactory, and convincing and also that there was a fair preponderance of the evidence which clearly and satisfactorily convinced the trial court that reformation should be granted and that this court will likewise be so convinced. It may be that the test in this court will be whether the trial court, acting reasonably, could have found the evidence clear and convincing and could have been clearly and satisfactorily convinced.

Appellant recites some of the testimony of Mr. Dowell at pages 40 to 47 of her brief. This testimony shows that Dowell advised the deceased that the owner of the auto court next to the property wanted to buy it, after advising her that he was interested in purchasing the property "adjoining the Bishop's Auto Court." Dowell also advised the deceased that the main reason respondents wanted the property was to straighten out their property and that they had in mind building a cafe there. Mrs. Jensen, the deceased, said she had thought of doing something like that if she had anyone to entrust it to and that, although her children did not want her to sell it, she was "glad to be free of it" because she couldn't take care of it. And the price per foot was discussed, relating it to the 75-foot frontage. This testimony shows clearly the understanding of the parties that the transaction was to cover the property adjoining

the Bishop's Auto Court so as to straighten up the lines and that the deceased was parting with her property there.

The surrounding circumstances are also important, as observed by the Wisconsin Supreme Court in *Kadow v. Aluminum Specialty Co.*, 253 Wis. 76, 33 N. W. 2d 236. That transaction involved some industrial property with a number of buildings on it, including a barracks, heating plant, and warehouse. After the transaction was consummated, it appeared that the boundary line as described in the deed cut off some of the buildings. The court observed that the parties assumed that the east line of the property would be such as to include the buildings and then made this statement:

“At the time the transfer was consummated he had in his possession an insurance plat of the buildings showing the buildings to be entirely on the lots which the Kadows retained. The natural and reasonable inferences which the court had a right to draw from the circumstances and the nature of the transaction added to the testimony of Kadow are sufficient to clearly and convincingly prove the alleged mistake.”

The important additional circumstances in this case are that the respondents purchased their property in 1946, as shown by the sketch at page 3 of this brief, and subsequently added one piece of property adjoining the property involved in this transaction. Since Mrs. Jensen had owned this property for many years, she must have

been aware of the acquisitions of the respondents and she indicates this by advising Mr. Dowell, when she learned that it was Mr. Sine who wanted to make the purchase, that "he should pay more for it." Obviously, the only reason he should pay more than anyone else was that he owned the adjoining property and by obtaining a large piece of frontage he would make the combined piece more valuable than if it were held by separate owners. And, of course, the only way to make it more valuable to him was to permit him to straighten up his lines, as does the sketch in the first part of this brief. Under these circumstances, if a real estate agent had come to Mrs. Jensen and advised her that the owner of the auto court wanted to buy the duplex property but was not interested in the narrow piece of vacant property between the duplex and the auto court, and that the purchaser was going to tear down the duplex and erect a building on the ground, she would have supposed that either the owner of the auto court or the real estate agent was out of his mind. It is unthinkable that the respondents would have bargained for the duplex and left a gap between their holdings, and equally unthinkable that Mrs. Jensen would have assumed that such was the transaction. And relating the price to be paid for the frontage of 75 feet and commenting that it amounted to more than \$100 a foot when a piece down the street sold for \$85 a foot makes inescapable the fact that Mr. Dowell and Mrs. Jensen understood each other and were talking about the same thing.

Use of the numbers for the street address was simply a convenient way of referring to the property, inasmuch as the vacant property had no street number. And, of course, the respondents had no way of knowing the width of the vacant piece as compared to the tract upon which the duplex was situated and no way of knowing that it was not all one piece. Mrs. Jensen apparently referred to the property in her own mind in the same way because in her will, made a few months after this transaction, and before respondents had learned of the mistake or commenced this suit, she referred to her property at 656-658 West North Temple, without reference to any vacant piece (probate file in supplemental record).

Citing cases on this question probably is not very helpful to the court. In cases of this kind each must stand upon its own peculiar facts and the test is the impression conveyed to the court. A recital of the facts is so useless as a precedent that in *Gray v. Gray*, 108 Utah 338, 160 P. 2d 432, this Court reviewed the evidence but did not recite it in its opinion and simply said that the evidence is clear and convincing and that is a sufficient answer.

The important thing in this case is that the strip of property in dispute determines whether respondents have squared up their property or have simply acquired an isolated piece in the general vicinity of their other property. In *Rauhut v. O'Donnel*, 37 Atl. 2d 66, the Delaware Chancery Court granted reformation to include

one-half of the ground under a party wall as they found it difficult to believe that parties would not agree to sell the land upon which the house stood. And respondents submit that it is equally difficult to believe and for the deceased to have believed that the respondents would have bargained for anything less than the property which adjoined theirs.

The deceased and the respondents did not walk around the property together but this was not necessary since the property was so well known to both of them. In effect, they were in the same position as the parties in *Nordfors v. Knight*, 90 Utah 114, 60 P. 2d 1115, where the plaintiff and defendant had walked over the land together and made some measurements on it and entered into a bargain which the court held must have been for the property they had examined and had in mind. At page 118 of 90 Utah the court comments on the fact that the parties looked over the land together, although nothing was said about boundary lines. The court states:

“We deem it unnecessary to make a further statement of the evidence, as we think the evidence is clear, definite, and convincing that the parties intended to include this 18.4 acres of pasture land in the sale. The mere fact that defendant denies some of the material matters testified to by plaintiff does not prevent the evidence from being clear, definite, and convincing. *Davidson v. Bailey*, 53 Okl. 91, 115 P. 511; *Karr v. Pearl*, 212 Ky. 387, 279 S.W. 631. It rarely happens that the testimony is undisputed and uncontroverted.”

In *Cram v. Reynolds*, 55 Utah 384, 186 P. 100, this Court reformed a contract to include shares of water stock in the belief that the evidence showed that the parties were thinking of the water when the bargain was made and that it was omitted from the contract by mistake. The trial court had refused reformation but this court revised the judgment, decreed reformation, and granted specific performance of the contract. The farm land in that case without water was as unthinkable a bargain as would cafe property in our case be without acquiring the land which gives access to it from the property already held by the respondents.

In *George v. Fritsch Loan & Trust Co.*, 69 Utah 460, at page 470, 256 P. 400, this court, in a case in which reformation was denied, laid down this rule:

“From a review of the authorities cited by counsel in their respective briefs, together with other cases and textwriters, we are of opinion that the better rule is that where the parties have in advance orally agreed upon the terms of a contract and later in reducing the contract to writing some of its terms are omitted by inadvertence or mistake, no absolute rule can be laid down, but in determining whether either of the parties is entitled to have the contract reformed to express the oral agreement of the parties, much depends upon the particular facts and circumstances of each case.”

The surrounding circumstances in this case coupled with the conversations had between the agent of the

respondents and the vendor make plain that the agreement between the parties was for sale of the 75-foot frontage which would square up the property of the respondents. The evidence of the daughters of the deceased, all of whom were interested parties, was apparently ignored by the trial court and should be ignored by this court as incompetent and immaterial. Even if the court considered the testimony and believed it, no other decision is indicated. If it be assumed that Mrs. Wheeler and her mother had the conversation to which Mrs. Wheeler testified (and the story is just too pat to be reasonable), it meant that Mrs. Jensen defrauded the respondents and the respondents should have judgment under their reply instead of the complaint, which error is not prejudicial. The testimony of the other sisters, if Mrs. Wheeler's is disbelieved, would only serve to fix the date on which Mrs. Jensen realized that the agreements had inadvertently omitted the vacant strip and the time, therefore, on which she made up her mind that she would endeavor to exchange the bargain made for the more favorable contract.

SUMMARY AND CONCLUSION

If respondents are right on the first three points of this argument most of the testimony of the appellant was improperly received and should be ignored by the court. This court can also assume that the trial court did not believe the testimony of appellant and ignore

it for that reason without any effort to reconcile the testimony.

Respondents contend that their testimony creating an agency with Mr. Dowell was properly received and that the similar testimony of Mr. Dowell was properly received as being the verbal act of creating the agency; and that the testimony of Mr. Dowell with the deceased was not incompetent under the dead man's statute inasmuch as Mr. Dowell was not a person directly interested in the event of the suit. These conversations made plain the ground being bargained for and the conversation of Mrs. Jensen was equally plain that she understood what Mr. Sine was offering to purchase. This evidence being clear, satisfactory, and convincing, the judgment of the trial court should be affirmed.

Respectfully submitted,

RICHARDS AND BIRD

Attorneys for Respondents