

1952

# Lillian Jackson v. Zinda Jackson : Brief of Plaintiff on Appeal

Utah Supreme Court

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Knox Patterson; O. A. Tangren; Attorneys for Plaintiff;

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IN THE SUPREME COURT  
of the  
STATE OF UTAH

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LILLIAN JACKSON,

*Plaintiff,*

— vs. —

ZINDA JACKSON, Executrix of the  
Estate of JOHN JACKSON, de-  
ceased,

*Defendant.*

Case No.

7793

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PLAINTIFF'S BRIEF ON APPEAL

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**FILE**

FEB 23 1952

KNOX PATTERSON,

O. A. TANGREN,

*Attorneys for Plaintiff*

Clerk, Supreme Court, Utah

Address: 205 Boston Building,  
Salt Lake City, Utah

# TABLE OF CONTENTS

	Page
STATEMENT OF FACTS.....	1
STATEMENT OF POINTS .....	6
ARGUMENT	
I. THE COURT SHOULD NOT HAVE EXCLUDED PARTS OF PLAINTIFF'S EVIDENCE AND SHOULD GIVE FULL CONSIDERATION TO UNDISPUTED EVIDENCE. ....	6
(a) PLAINTIF MAY TESTIFY IN RELATION TO ORAL AGREEMENT. ....	22
(b) ATTORNEY MAY TESTIFY.....	28
(c) TRIAL COURT MAY NOT REJECT UNDISPUTED EVIDENCE. ....	32
(d) SEPARATE WRITINGS RELATING TO SAME SUBJECT SHOULD BE CONSTRUED TOGETHER. ....	34
II. THE COURT MISCONSTRUED THE STATUTE OF FRAUDS AND CONFLICT OF LAWS.....	36
III. COURT SHOULD HAVE CONSIDERED PLAINTIFF'S PLEA OF ESTOPPEL.....	43
CONCLUSION .....	62

## INDEX OF CASES

Aho vs. Kunsert, 87 Pac. 2nd 358 (Cal.).....	54
Alexander v. Lewis, 175 Pac. 577 (Wash.).....	50
Anderson v. Thomas, 108 U. 252, 159 Pac. 2nd, 142 (Utah 1945)....	30
Anthony v. Anthony, 211 Pac. 2nd, 331 (Cal.).....	43
Ayoob v. Ayoob, 168 Pac. 2nd 462, 466 (Cal. 1946).....	35-40
Balfour v. Garreth, 111 Pac. 615.....	39
Begovich v. Begovich, 60 A.L.R. 1046 (Wyo.).....	25
Berkey v. Hahn, 224 Pac. 2nd 885-889 (Cal. Dec. 1950).....	61
Brown v. Superior Court, 212 Pac. 2nd 878-81 (Cal. 1949).....	40-58
Burrows v. Burrows et ux, 22 Pac. 2nd 1072 (Cal. 1934).....	57
Carey et ux v. Howell et al, 204 Pac. 2nd 193 (Wash.).....	31
Coleman v. Satterfield, 223 Pac. 2nd 61-63 (Cal. 1950).....	40
Crofoot v. Thatcher et al, 19 Utah 212, 57 Pac. 171 (Utah).....	38
Danz v. Danz, 216 Pac. 2nd 162 (Cal.).....	43
Doty v. Doty, 2 L.R.A. (NS) 713 (Ky.).....	27
Durbin et al v. Hillman, 195 Pac. 274.....	40
Exsted v. Exsted, 117 A.L.R. 605 (Minn.).....	24
Fernandez v. Aburrea, 183 Pac. 366.....	43
Freeman et al v. River Farms Co., 44 Pac. 2nd 199 (Cal. 1936).....	56
Fuller v. Nelle et al, 55 Pac. 2nd 1248 (Cal.).....	54
Goodin v. Eastleman, 200 N. W. 95 (N. Dak.).....	52
Grant v. Long et al, 92 Pac. 2nd 940 (Cal.).....	56
Grieve v. Howard, 54 Utah 225, 180 Pac. 429 (Utah).....	27
Harness et al v. Industrial Comm. of Utah, 82 Utah 276, 17 Pac. 2nd 277.....	33
Hynes v. White, 190 Pac. 838 (Cal.).....	32
In Re Van Alstine's Estate, 26 Utah 193, 72 Pac. 242.....	26
In Re Young's Estate, 33 Utah 382, 94 Pac. 732.....	28

	Page
Jones v. Clark, 119 Pac. 2nd 731 (Cal. 1941).....	58
Jorgensen v. Pardee, 224 Pac. 2nd 835 (Cal. 1950) .....	42
Leoni v. Delaney, 88 Pac. 2nd 765 (Cal. 1948).....	40
Maybourne v. Citizen's Saving Bank, 188 Pac. 1034 (Cal.).....	57
McManus v. Fulton, 167 A.L.R. 690 (Mont.).....	39
Mercantile C. v. Frank, 56 A.L.R. 696 (Cal.).....	39
Mertz v. Mertz, 108 A.L.R. 1120.....	41
Miller v. Livingstone, 31 Utah 415, 88 Pac. 358 (Utah).....	27
Monorco v. Le Greco, 211 Pac. 2nd 363 (Cal. 1950).....	40-62
Monsen et al v. Monsen, 162 Pac. 90 (Cal.).....	49-50
Notten v. Mensing et al, 45 Pac. 2nd 108 (Cal.).....	49-50
O'Brien v. O'Brien, 241 Pac. 860 (Cal.).....	39
Offman v. Robertson, 251 Pac. 830.....	40
Palmer v. Palmer, 26 Utah 31, 75 Pac. 3 (Utah).....	41
Parker v. Weber Co. Irr. Dist., 68 Utah 472, 251 Pac. 11-13.....	33
Ryan v. Welte, 198 Pac. 2nd 357 (Cal.).....	55
Sargavak's Estate, 216 Pac. 2nd 850 (Cal. 1950).....	58
Searles v. Gonzales, 216 Pac. 1003 (Cal.).....	34
State v. Supreme Court, 74 Pac. 2nd 888 (Wash.).....	43
Stats v. Stats, 63 Utah 470, 226 Pac. 677.....	27
Tigglebeck v. Russell, 213 Pac. 2nd 156 (Or.).....	35
Tremayne v. Tremayne, 115 Utah ....., 211 Pac. 2nd 452 (194).....	43
Van Alstine's Estate, 24 Utah 193, 72 Pac. 242.....	26
Walker v. Calloway, 222 Pac. 2nd 455 (Cal. 1950).....	60
Warden et al v. Hutchinson, 231 Pac. 563 (Cal. Code 1624, Sub. D. 7) .....	39
Webb v. Webb, 115 Utah ....., 209 Pac. 2nd 201 (Utah 1949).....	30
Young's Estate, 33 Utah 382, 94 Pac. 732 (Utah).....	28

### STATUTES CITED

California Civil Code 1624, Sub. D. 6 .....	39-59-60
California Code Civil Procedure, Sec. 1973 .....	59-60
California Code Civil Procedure 1931, Sec. 1623.....	52
California Code Civil Procedure 1931, Sec. 1972.....	53
Utah Code Annotated 1943, Sec. 104-3-1.....	23
Utah Code Annotated 1943, Sec. 104-49-2.....	22

### TEXT BOOKS CITED

Am. Jur. Vol. 19, p. 656, Sec. 52.....	47
Am. Jur. Vol. 20, p. 1030, Sec. 1180.....	32
Am. Jur. Vol. 26, p. 876.....	42
Am. Jur. Vol. 49, p. 617, Sec. 306.....	46
Am. Jur. Vol. 49, p. 853, Sec. 550.....	46
Am. Jur. Vol. 49, p. 889, Sec. 582 .....	46
Am. Jur. Vol. 49, p. 862, Sec. 556.....	48
Am. Jur. Vol. 50, p. 283, Sec. 505.....	30
Am. Jur. Vol. 57, p. 165, Sec. 187.....	35
Am. Jur. Vol. 57, p. 171, Sec. 193.....	35
Am. Jur. Vol. 58, p. ....., Sec. 282.....	23
Am. Jur. Vol. 58, p. 283, Sec. 505.....	30
A.L.R. Vol. 73, p. 1392.....	51
A.L.R. Vol. 106, p. 758.....	51
Page On Contract, Vol. 6, p. 3617.....	38
Page On Contracts, Vol. 6, p. 6180.....	38

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LILLIAN JACKSON,

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Case No.

7793

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PLAINTIFF'S BRIEF ON APPEAL

---

STATEMENT OF THE CASE

John and Lillian Jackson were married in Moab, Utah in the year 1896. There were 7 children born as a result of this union.

Prior to 1917 John Jackson became addicted to the use of intoxicating liquors and in 1917 Lillian Jackson filed divorce proceedings in Grand County, Utah, charging habitual drunkenness and cruelty, all as set forth in

the plaintiff's complaint. (Record, page 100 Ex. 11-12). Mrs. Jackson employed the firm of Patterson and Constantine to conduct her divorce proceedings, and they prepared and filed a complaint for Mrs. Jackson. (Record, page 12).

Up to this time they had accumulated property of the approximate value of \$50,000.00, consisting mostly of notes, mortgages, and other securities.

At the time the suit was brought, Mrs. Jackson had advised counsel that she and her husband had agreed upon a property settlement. After the divorce action was filed John and Lillian Jackson came to the office of Knox Patterson for the purpose of dividing the property so accumulated. John Jackson brought the securities with him, threw them on the desk and said to Attorney Patterson, "Here are all of our securities, split them fifty-fifty." Patterson immediately began listing the property for the fifty-fifty division.

While the property settlement was being worked out, Lillian Jackson said to John, what about the support of the children, as you agreed? John said, I will not pay any support money, I will divide the property equally and you will have to support the children. A violent argument broke out. Patterson interceded in behalf of Mrs. Jackson, telling John that he could not expect his wife to rear, and support 7 children on a 50-50 split of the property. John became angry at Patterson, picked up his securities and left the office. The divorce was abandoned.

John Jackson then moved his family to California. In 1918 apparently John Jackson wanted his wife to se-

cure a divorce. He employed counsel himself, had the marriage settlement of 1918 prepared. This was brought to Lillian Jackson for signature. She and the family, including a son-in-law and his wife, looked over the proposed property settlement and again she refused to sign the contract and stated to John that it was the same as at Moab, she got nothing for caring for the children. After much argument and discussion John Jackson then agreed that he would will to each of the children \$3,500.00 if Lillian Jackson would sign the agreement as prepared by John Jackson and his counsel.

Upon the strength of that promise and relying thereon, Mrs. Jackson signed the agreement as prepared. In good faith of John's promise to will the children \$3,500.00 each, he delivered to Lillian Jackson a certificate of the Woodmen of the World for \$1,000.00, which he represented was paid up, with the understanding that the \$3,500.00 which should go to each of the four girls should have \$250.00 each out of the \$1,000.00 certificate, which then stood in the name of Lillian Jackson as beneficiary. The certificate was so accepted by Lillian Jackson and she received delivery thereof and has ever since had the possession of said certificate.

At this time Mrs. Jackson asked John to draw the will but John told her he would not draw the will until the divorce was secured. Then Mrs. Jackson told John that she wanted Knox Patterson of Moab to draw the will. It was then agreed that he would return to Moab and after the divorce was granted and have Patterson draw the will, bequeathing to each of the children

\$3,500.00, less credit of \$250.00 to each of the 4 girls on account of the Woodmen of the World certificate.

After the divorce was secured, John Jackson wrote a letter to the W.O.W. asking for a change in the beneficiary of the W.O.W. certificate, making affidavit to the effect that said certificate, which has been delivered to Lillian Jackson, had been lost. A new certificate was then issued for \$1,000.00 running to the 4 girls who should share in the original certificate, to be deducted from their \$3,500.00 bequest. That was sometime in the early part of 1920. What became of this certificate to the four girls is not known so far as the Jackson family is concerned. However, it finally got to the new wife, whom he married immediately after the divorce.

Thereafter, on September 7, 1920, John Jackson came to Moab and to the office of Patterson and Constantine. He there related to Patterson that he and his wife, Lillian, had agreed upon a divorce settlement and that he agreed with Lillian that he would return to Moab and have Knox Patterson draw a will whereby he should will to each of the children the sum of \$3,500.00. He showed to Patterson the marriage agreement and he was asked by Patterson why there was nothing about it, the will, in the marriage settlement. John replied that, first, he did not want to make a will until after the divorce was obtained, and, second, that his wife wanted Knox Patterson to draw the will.

John Jackson then stated that the will bequeathing \$3,500.00 to each of the children should be off-set as to the 4 girls, to the extent of \$250.00, stating further that he



had delivered to Lillian Jackson a W.O.W. certificate for \$1,000.00 and that \$250.00 should apply to the bequests of each of the 4 girls, reducing their bequests to \$3,250.00. The will was drawn accordingly and as to the four girls the will reads as follows:

To Belle Dennis \$3,250.00 "she also to receive as beneficiary in my insurance policy with the W.O.W. to the extent of \$250.00." The same was written in the bequests to each of the girls.

All as shown in Exhibit I, proffered in testimony but rejected by the court. (Record, page 100).

This will, Exhibit I, was immediately sent to Belle Dennis, to her address in California, and their mother was immediately advised of this fact by Belle Dennis. Therefore, Mrs. Jackson, knowing that the will had been drawn was lulled into security as a result of the oral promise by reason of the execution of the will according to that oral promise. She never knew of the diversion of the W.O.W. certificate until after John's death. She never knew of the revocation of the will, Exhibit 3, by a new will of 1946, until after John's death.

Upon the oral agreement she immediately took charge and custody of the children, reared and educated them to maturity.

John Jackson, as a result of speculation on his 50 percent of the property divided, ran his fortune up to around \$100,000.00. (R. p. 220).

We duly filed a claim against the Estate, as required by law, and the claim was rejected, and suit was brought thereon.

We were required to amend our pleadings when the defendant set up the California Statute of Frauds. In doing so we qualified for the plea of estoppel.

## STATEMENT OF POINTS

### POINT I.

THE COURT SHOULD NOT HAVE EXCLUDED PARTS OF PLAINTIFF'S EVIDENCE AND SHOULD GIVE FULL CONSIDERATION TO UNDISPUTED EVIDENCE.

(a) PLAINTIFF MAY TESTIFY IN RELATION TO ORAL AGREEMENT.

(b) ATTORNEY MAY TESTIFY.

(c) TRIAL COURT MAY NOT REJECT UNDISPUTED TESTIMONY.

(d) SEPARATE WRITINGS RELATING TO SAME SUBJECT SHOULD BE CONSIDERED TOGETHER.

### POINT II.

THE COURT MISCONSTRUED THE STATUTE OF FRAUDS AND CONFLICT OF LAWS.

### POINT III.

COURT SHOULD HAVE CONSIDERED PLAINTIFF'S PLEA OF ESTOPPEL.

## ARGUMENT

### POINT I.

THE COURT SHOULD NOT HAVE EXCLUDED PARTS OF PLAINTIFF'S EVIDENCE AND SHOULD GIVE FULL CONSIDERATION TO UNDISPUTED EVIDENCE.

KNOX PATTERSON AS A WITNESS:

Attorney at law, residing in Moab. Acquainted with John Jackson and his wife. Did legal services for them, from 1909 to 1925. Not on a retainer basis. Had worked for Mrs. Lillian Jackson in 1917.

Patterson then offered evidence showing the drawing of the divorce complaint of 1917 and also offered testi-

mony with reference to a marriage settlement growing out of the divorce action; that the settlement was rejected by Mrs. Jackson because it gave her only one-half of the property but imposed upon her the support of the seven children. All of this testimony was rejected. (R., page 181).

In a day or two after the divorce action was signed, John Jackson and his wife came to my office with notes, papers, mortgages, and bills, and he threw them on my table and said, "Patterson, here is all I have got, and I want to split fifty-fifty." I took the papers and started to separate them, had a tablet, and was classifying them into two groups. Then Mrs. Jackson said, "You told me you would take care of the children." John said: "No, I won't take care of the children." Then Patterson got into an argument with him and told him he could not expect to divide his property fifty-fifty and have the wife take care of the children. John Jackson became angry with him, abused him, and walked out of the office. He heard nothing more about the divorce. Shortly after that he (John Jackson) left and took his wife and children to California. (R., page 181).

Afterwards, in 1920 John Jackson came back to my office and in the presence of myself and George J. Constantine stated to me he wanted to draw a will. The last time that I had seen him, he was mad and angry with me because he said I had sided with his wife about taking care of the children. He said his wife had divorced him and they made a marriage settlement and showed it to me. I said to Jackson, "Why didn't you put this part

about the will in this agreement?" He said, "In the first place, I wasn't going to draw any will until she got the divorce; and, in the second place, she told me that she wanted Knox Patterson to draw the will." And he came to Utah for that purpose. In regard to the marriage settlement which he showed me, he said that she told him that she would not sign it, and said, "No, this is just like the Moab Settlement, and I will not sign that unless you agree to take care of the children." And finally he told her he would will the children \$3,500.00 each if she would sign this agreement, and he said that the \$3,500.00 represented substantially what he had given his wife, so he wanted the will drawn whereby each child would receive \$3,500.00. So we started to draw the will. He said, "This isn't right. I said that I would make a will if she would sign this agreement, but I have delivered to her a Woodmen of the World certificate for \$1,000.00 that is to apply on the \$3,500.00 which I will to each of the girls." In other words, \$250.00 of that certificate would be awarded to each of the four girls, and so I drew the will accordingly. I am speaking of the will of 1920. The will shows that each of the boys got \$3,500.00 and each of the girls got \$3,250.00. (R., page 184-186).

I do not remember whether he paid me for drawing the will. He did not pay me for the divorce because he thought I hadn't given him a fair deal and that I had sided with his wife.

The Court: "You were acting for him as his attorney?"

Answer: "I was acting for his wife as her attorney,

because he told me that she had said that she wanted Knox Patterson to draw the will." (R. p. 186).

George J. Constantine and I witnessed the will. He told me to mail a copy to Belle Dennis at Orlando, California. George Constantine wrote and signed the letter and mailed it to Belle Dennis. (R., page 186-187).

After this controversy arose, I asked Mrs. Dennis to send me the will and she did. I received the \$1,000.00 Woodmen of the World certificate from Mrs. Jackson from California. (R., page 187).

#### JOE DENNIS' TESTIMONY:

"I reside in Fallon, Nevada. I am not an heir of John Jackson, but a relative. I am Belle Dennis' husband. She resides at Fallon with me.

"I have known John Jackson since 1913, when I married Belle. I was present at Orlando, California, in the spring of 1918 and lived in the same house with Mrs. Jackson, when John Jackson came to the house with the marriage settlement. Mr. and Mrs. Jackson, myself, and wife, and probably some of the children were present. I heard the discussion between John and Lillian Jackson about the marriage settlement. I did not take part in the discussion. (R., page 191). He handed her or gave her a marriage contract to sign and she read it over and said she would not sign it, that it was on a fifty-fifty basis and she would have to care for the children. They then started to argue and the argument started when they did settle down, he said, 'I'll tell you what I will do, I will make a will to give each of the children \$3,500.00 a piece.' She said, 'If you will do that, I will sign it.' So, he went

on and said, 'I will give you that Woodmen of the World, as down payment and he handed it to her. (Referring to the \$1,000.00 Woodmen of the World certificate). As down payment on the bargain.

"He was going to have the insurance policy made out when she got the divorce. He got the Woodmen of the World certificate out of his suit case.

"I had a further conversation with John Jackson in 1931, right here in Moab. Just he and I were present. He told me that he had a place out here that he would foreclose on, if Belle would take it over in place of the \$3,500.00 and we went down and looked at it, it was the Stewart place I think.

"I had another conversation with John Jackson in 1941. It was at the Moore place in Moab. That was in the fall of the year. My wife and I don't know, but seems like Sinda was there too. When we went down and looked at it John said she could have the place in the place of the \$3,500.00. He meant the \$3,500.00 mentioned in the will." (R., page 191 & 195).

#### CROSS-EXAMINATION:

"My wife is the daughter of Lillian Jackson. She is a sister of the brothers and sisters named as parties for which this action was brought. We are here together. I came to testify for her in the case. I would like to see her win the law suit. I would not like to see her lose everything." (R., page 193).

Now let us note Record, page 194, page 31 of transcript, when the above named witness, Joe Dennis, testified:



“\* \* \* we also object on the further grounds that it is hearsay, that this witness is an incompetent witness under the provisions of 104-49-2 Utah Code Annotated, dated 1943, commonly called the (Dead Man Statute). Also on the grounds that it is proffered testimony to prove an oral contract.

“THE COURT: ‘Well, the objection that it is hearsay and the objection that he is incompetent to testify, I will overrule. The objection that it is proffered testimony to prove an oral contract is sustained.’ ”

The testimony given by this witness was not proffered testimony, but testimony on direct examination where the records show he was free to testify.

Then the witness continued to testify at length. We are unable to say upon what theory the objection to the testimony as proffered testimony is sustained.

It is evident throughout, as shown by the transcript of testimony, that the Court excluded and meant to exclude any testimony in proof of an oral contract, regardless of performance, part performance, or estoppel.

(R., page 189, page 26 in transcript). “If you can show me anything that will take this case out of the Statute of Frauds, gentlemen, I would be happy to do so, but there is no writing shown to take the case out of the Statute of Frauds.”

(R., page 190, Trans. 27). “It is evidence of an oral contract, but understand that is just a part of it, yes, but it isn’t evidence of any writing or written agreement to take the case out of the Statute of Frauds . . . The California statute says that you can’t introduce oral evidence

to prove an agreement to make a will that is not in writing, the statute says that you can't do that."

(R., page 208, Trans. 43). "\* \* \* and that it is not admissible under the Statute of Frauds pleaded by the defendant, unless it is an attempt to show something in writing that tends to take it out of the Statute of Frauds."

(R., page 209, Trans. 44). "THE COURT. I won't permit you to prove that by this witness. I think she is incompetent in the first place and I don't think it will take the case out of the Statute of Frauds in the second place.

MR. PATTERSON: Because of an oral agreement?

THE COURT: Mr. Patterson, I don't think that it tends to prove fraud. I don't think that what you are going to ask her tends to prove part performance. You are trying to prove by her testimony an oral contract."

The Court, having taken this position that nothing short of a writing could prove the promise to make a will, it is remarkable that he ordered a pre-trial or permitted the case to go to trial at all. It is incomprehensible when we allege nothing but an oral contract in our complaint and the part performance thereof by the delivery of the Woodmen of the World certificate and the execution and delivery of the will, and the support and maintenance of all the children to maturity.

LILLIAN JACKSON, as a witness in her own behalf:

This witness was not permitted to testify except in a limited sense, to-wit:

I had a conversation with you (Knox Patterson) and



my husband, John Jackson, in your office prior to going to California with my husband and 7 children. One child was married, that was Joe Dennis' wife. I decided to get a divorce in California. I entered into a marriage settlement there with John. John and I had some controversy about the marriage settlement. (R., page 201, T. 36).

Mr. Patterson then made the following offer of testimony:

"MR. PATTERSON: We offer to prove by this witness, your honor, that after they had lived in California a short time, Mr. Jackson and Mrs. Jackson decided to get a divorce, and again the question of a property settlement came up, and he goes to his own lawyer and has a property settlement prepared, which was much along the lines as the one which was prepared in Moab, and he presented it to her for signature in her own home, in the presence of Belle and Joe, and she, after reading it over, said, 'no I will not sign that, that is just like the Moab Agreement and I will not sign it.' Then they fussed and argued there for a day or two and then John finally came to her and said, 'listen, if you will sign this, I will make a will, willing the rest of my property to the children, which will amount to \$3500.00 for each of the children.' They thought that over for a while and finally agreed and under those conditions she signed this agreement, which is void, there must be some consideration to support it."

THE COURT: Mr. Patterson I understand that she got her share in consideration of it?

MR. PATTERSON: Certainly, they split 50-50, she is entitled to that without taking care of any children.

THE COURT: I will not let her testify to that because of an oral agreement. (R., page 208-209, T. 43-44).  
LILLIAN JACKSON, RE-DIRECT:

Mrs. Jackson corrects herself on the date which she received the \$1,000.00 Woodmen of the World certificate and says the certificate was delivered to her in 1918; says she has talked to no one since her testimony of yesterday. (R., page 227).

#### DEFENDANT'S TESTIMONY:

Counsel identifies marriage certificate between John Jackson deceased, and Miss Zinda Cordova, married Oct. 3, 1921. John Jackson 46, Zinda Jackson 21. Also identifies ages of 6 children of the marriage of John and Zinda.

#### HENRY RUGGERI AS A WITNESS:

Testifies that he has examined the authorities of California with reference to the Statute of Frauds, cites the following cases:

Hagan v. McNary, 170 Cal. 141, 144, 148 P. 937; L. R. A. 1915E, 562; Trout v. Ogilvie, 41 Cal. App. 167, 182 Pac. 333; Demattos v. McGovern, 25 Cal. App. 2nd, 429; 77 Pac. 2nd, 522; Zaring v. Brown, 41 Cal. App. 2nd 227; 106 Pac. 2nd, 224; Smith v. Bliss, 44 Cal. App. 2nd 171, 112 Pac. 2nd, 30; Long v. Rumsey, 12 Cal. 334, 84 Pac. 146; Rotea v. Izuel, 14 Cal. 2nd 605, 95 Pac. 2dn 927, 164 Pac. and 914. (R. p. 220-224 & 228-230).

The Court says: “\* \* \* excluding proof of the alleged oral contracts to make a will I set forth the facts I could find IF I BELIEVED ALL OF THE EVIDENCE AND PROFFERED EVIDENCE.” (Emphasis ours).

Then the court sets forth by alphabetical paragraphs the matters he could find if he believed the testimony. Now quoting from Paragraph D of the possible findings:

“That plaintiff and John Jackson could not agree about a property settlement; that shortly thereafter plaintiff and John Jackson moved to California and abandoned the proceedings in Utah.” (R., page 112).

Now quoting from Paragraph E of the courts possible findings:

“That about April 22, 1918 plaintiff and John Jackson entered into a written property agreement in the State of California, wherein and whereby plaintiff agreed to accept property of the approximate value of \$28,689.00 and assumed custody and support of 5 children, ages 19, 13, 10, 6 and 3, respectively, and John retained property of the approximate value of \$20,434.00 and agreed to assume the custody and support of the child age 15.” (R., page 113).

Quoting from Paragraph F:

“That plaintiff employed the attorney who drafted said agreement.” (R., page 113).

Quoting from Paragraph G of the court’s possible findings:

“That plaintiff and John Jackson had an argument about this contract in the presence of their oldest daughter, Belle and her son-in-law, Joe Dennis, and plaintiff said that she thought it was not fair, it was a 50-50 division and she would have to support the children.” (R., page 113).

Quoting from Paragraph H:

“That at the time of said argument, John

Jackson handed plaintiff a Modern Woodmen of the World Life Insurance Certificate for \$1,000.00 \* \* \* in which plaintiff was beneficiary, and told her he would make out the policy when she got a divorce..” (R., page 113-114).

Quoting from Paragraph J :

“That in December, 1919, “plaintiff” hired an attorney and procured an interlocutory decree of divorce from John Jackson in the State of California on the ground of drunkenness and cruelty, \* \* \* and made no mention of a property settlement, alimony, or support money. That the judge who signed said decree was the attorney who drew the property agreement which was executed by the plaintiff and John Jackson.” (R., page 114).

Quoting from the court’s possible findings, Paragraph K :

“About March 13, 1920, John Jackson filed an affidavit with the Modern Woodmen of the World, swearing that he had lost his insurance certificate, and on March 22, 1920 \* \* \* Company issued a new certificate for \$1,000.00 with the 4 daughters of John Jackson and plaintiff as beneficiaries, in the sum of \$250.00.” (R., page 114).

Quoting in part now from Paragraph L of the possible findings :

“That on Sept. 7, 1920 John Jackson went to the office of Patterson and Constantine in Moab and had them draft a will which he duly executed; that said will provided \$3,500.00 each for 3 of the children and \$3,250.00 for each of the 4 daughters who are beneficiaries in his insurance policy and recited that they were provided for in his insurance policy to the extent of \$250.00 each.” (R., page 114).

Quoting from Paragraph N :

“That at the time said will was made, John Jackson told Patterson and Constantine about the marriage settlement agreement and showed it to them. That Jackson told Patterson, ‘I was not going to draw any will until she got the divorce and she told me she wanted Knox Patterson to draw the will.’ That John Jackson said the \$3,500.00 each represented substantially what he had given his wife. That Jackson told Patterson, that he had delivered to the Plaintiff a Woodmen of the World Certificate for \$1000.00 and that it was understood that each of the four (4) daughters should receive \$250.00 of that certificate.” (R., page 115).

Quoting Paragraph S:

“In 1913, at Moab, Utah, John Jackson offered Joe Dennis his son-in-law, to foreclose on the Stewart property and give it to his daughter Belle in place of the \$3500.00. (Presumably the bequest in the will.) (R., page 116).

Quoting Paragraph U:

“In 1941, at Moab, Utah, John Jackson told Joe Dennis, that Belle could have the Moore place, instead of the \$3500.00 that was in the will.” (R., page 116).

Quoting Paragraph W:

“That from the date of plaintiff’s written contract with John Jackson on April 22, 1918, plaintiff supported the minor children of plainiff and John Jackson, who were left in her custody until they reached the age of majority or were self supporting, and educated them and supported herself until the time of this action with the property she received as a result of said marriage contract and that plaintiff has exhausted the property so received.” (R. page 116).

### Quoting Paragraph X:

“That John Jackson left an estate of the value of \$97,931.35.” (R., page 116).

Then the court in its opinion, without any evidence thereof, says he was obligated to speculate to some extent on the value of property distributed to each by the contract of 1918, and draws upon his personal knowledge as to the value of cattle, mules, wagon, and harness in the Spring of 1918, fixing a value of \$3300.00 for 22 cattle; \$200.00 for 2 mules; \$75.00 for wagon; \$75.00 for double harness; household furniture \$1000.00; Elgin automobile \$1500.00, making a total of \$6150.00 and the court then says: (R., page 116-117)

“On March 13th, 1920, John Jackson filed an affidavit with the Modern Woodmen of the World, swearing that he had lost his insurance certificate and a new certificate was issued to him on March 22nd, 1920, with four (4) daughters as beneficiaries.” (R., page 117).

Then the Court says further:

“From the evidence introduced and from the proffered evidence, I find as a matter of fact, that John Jackson did not deliver the Modern Woodmen of the World Certificate to Plaintiff in 1918 or in 1920 and that he made no representations to the plaintiff concerning said certificate except that he told plaintiff he would have the certificate of insurance made over to his four (4) daughters after she procured a divorce. I feel that the written affidavit made to the Insurance Company in 1920 is better evidence than the memory of the witnesses some thirty years later.” (R., page 118).

\* \* \*



“That if any such oral agreement was made, it is invalid under the Statute of Frauds of the State of California. That defendant is not estopped to set up the Statute of Frauds of the State of California.” (R., page 118).

“That plaintiff is a proper party plaintiff in this action. I conclude that plaintiff’s action should be dismissed at plaintiff’s costs.” (R. page 119).

It will be observed in the caption of the Memorandum opinion that the court refuses to believe plaintiff’s evidence in the case.

Then in concluding the Memorandum Decision the court gives us the final knock-out blow in which he says:

“I find from all the evidence in the case which I consider admissible and competent that John Jackson did not make an oral agreement to make a will as pleaded by the plaintiff or otherwise or at all.” (R., page 118).

This decision no doubt was intended to be decisive of the entire case, as the general rule is that this character of case the superior court follows the findings of the trial court. However, we recall proudly that superior courts have uniformly held that a trial court cannot arbitrarily and capriciously utterly refuse to consider undisputed testimony in the case. This part of the court’s decision is unwarranted, unfair, and unjust. This question is treated hereinafter.

The court talks disparagingly of the memory of the plaintiff’s witnesses, yet it does not hesitate to draw upon its own memory and go back 33 years to state the value of cattle, mules, wagons, harness, and an automo-

bile, when there was no evidence with reference to these items and most surely the court had no knowledge of the kind of cattle or mules, and the wear and tear of the machinery. Just why the court saw fit to comment on these items we are unable to say, as all of the testimony shows a desire and intent to split the property on a 50-50 basis, and, furthermore, the items which the court named were supposed to be included in the farm property for which Mrs. Jackson was charged \$14,000.00.

The court finds that in 1918 cattle were worth \$150.00 a head, perhaps there are members of the court who can recall that we were in a financial slump and that shortly thereafter banks were failing everywhere, especially those carrying cattle paper.

If our memory serves us, the Honorable Judge, 33 years ago, was somewhat of a boy.

The court further says:

“I find one serious inconsistency with the testimony offered by the plaintiff, in that she testified ‘three times’ that she received the life insurance certificate in 1920.” (R., page 117).

Now let us turn to the transcript and see what happened. We insist that plaintiff did her very best to tie the delivery of the Woodmen of the World certificate to the promise to make a will:

“Q. Have you had possession of this certificate?

A. Ever since he promised—”

The obvious answer would have been, ever since he promised to make the will. But objections and the court ruling prevented the old lady from giving the correct date. Again:



“Q. Can you fix the time by another event?

A. 1920, I am sure that I received it when I had that—”

Obviously she was going to answer when I had that agreement with John, but again she was frustrated by court and counsel.

Then again:

“Q. Do you know when you got possession of that certificate?

A. I got possession—”

\* \* \*

“The Court: I won’t permit her to testify to any event if she can fix the time to an exact date.” (R., page 211-212).

The reading of the transcript clearly shows that she would have fixed the receipt of the W.O.W. certificate at the time the oral agreement to make the will was had. It is evident that she was unable to fix the exact date except by the course of events at the time, and it was erroneous for the court to refuse to permit her to connect the date with these events. (R., page 211).

I believe the record shows Mother Jackson to be 76 years of age.

The court, in his memorandum opinion, says that he prefers to believe the letter that John Jacobson wrote to the Woodmen of the World where it is said he had lost the certificate than the evidence in behalf of the plaintiff. We insist that the affidavit of loss of certificate is self serving not germane to the issue, but it is evidence that John Jackson did not dare to call upon his wife for the Woodmen of the World certificate because he told her it was a paid up certificate. It, of course, she was not

capable of analyzing. Then, again in this connection, keep in mind that when the certificate was changed and issued to the four girls as beneficiaries, neither Mrs. Jackson nor any of the girls ever knew of such change until after John Jackson's death. So if he had promised to issue a new certificate with the girls as beneficiaries, they never received it and never knew anything about it. His call upon Lillian Jackson for surrender of the Woodmen of the World certificate would have tipped her off immediately that something was wrong and would lead to inquiry.

Jackson's affidavit with reference to the loss of the Woodmen of the World certificate was a deception which the court, in its prejudice against the plaintiff's testimony could not appreciate.

(a) PLAINTIFF MAY TESTIFY IN RELATION TO ORAL AGREEMENT.

We say yes, for the reason that the plaintiff, Lillian Jackson, is suing in a representative capacity and she is made a trustee of an expressed trust by our statute. Utah Code 1943, Section 104-49-2.

It is evident she has no direct pecuniary interest in this proceeding. She sacrificed the W.O.W. certificate of which she was the beneficiary; the will of 1920 gave her nothing. She sacrificed everything for herself to the end that her children should finally reap the benefit of any estate which might accrue to John Jackson by reason of the fact that he took the money from the children, approximately \$24,500.00, to speculate on during his lifetime and built his estate up to approximately \$100,000.00.

Section 104-3-1, U.C.A. 1943, provides every action must be prosecuted in the name of the real party in interest, except that an executor, administrator, or trustee of an expressed trust may sue without joining the party in interest.

A person with whom or in whose name a contract is made for the benefit of another is a trustee of an expressed trust within the meaning of this section.

Section 104-49-2 disqualifies a party to any civil action and all persons directly interested in the event thereof.

The term "party" as above defined has been the subject of a great confusion with the court, including our own courts.

58 A. J., Sec. 282 defines the meaning of "party" as follows:

"A statute disqualifying a "party" from testifying as to transactions with a deceased person does not apply to one who is not a party or interested therein but is a mere witness. According to some authorities, although on its face the statute disqualifies every person who is made a party to the record, its application is limited to those persons who are properly joined as parties, and further to those of the proper parties to the record who are parties to the issue."

Thus it appears that the term "party" is generally meant to include only those who are directly interested in the result of the suit.

Sec. 284, quoting:

"Nominal Parties.—Although some statutes have been construed to include nominal parties as embraced within the meaning of 'parties' disqualified as witnesses in an action against a per-

sonal representative of a decedent or the guardian of an incompetent, according to the construction generally placed upon these statutes, the 'party' 'opposite party,' etc., who is silenced, *is the real party in interest, and not a mere nominal party who is not interested in the result of the suit.* A nominal party has been held competent to testify as to the execution of a lost deed by a decedent." (Italics ours.)

**Exsted v. Exsted, 117 A.L.R. 605 (Minn.):**

"The difficult question, and one of first impression before this court, is whether an administrator is a party within the meaning of the statute. Since it operates to exclude otherwise competent evidence, the statute should be strictly, although fairly, construed. *Sievers v. Sievers*, 189 Minn. 576, 250 N.W. 574. On its face the statute disqualifies every person who is made a party to the record. The application of this language has been limited to those persons who are properly joined as parties. (*Towle v. Sherer*, 70 Minn. 312, 73 N.W. 180), and further limited to those of the proper parties to the record who are parties to the issue.

"An executor or administrator, while a necessary party to the record, is not a party to the issue. In *Bryant v. Livermore*, 20 Minn. 313, Gil. 271, opinion per Berry, Jr., the appellant challenged the right of Mr. Chief Justice Ripley to sit in the cause because of his relationship to the guardian ad litem and general guardian of the minor defendants under a statute disqualifying a judge of a court of record from hearing a case when he was a relative of a party to the action.

The court resolved the question against the ap-

pellant upon the ground that a guardian ad litem is not a party, but is a representative in the nature of an attorney appointed by the court of the real party in interest and by whom an infant is required to appear in an action. He is not a party in interest merely because he is answerable to the infant whom he represents for his negligent conduct of the suit or because in some rare circumstances he might be chargeable with costs."

Thus it will be seen from the reasoning of this case, which follows many more, that where a disqualified party resigns the disqualification is removed, but this Minnesota case and the authorities cited thereunder hold in fact that where a nominal party is suing it would be a futile thing for a nominal party rightfully suing to be compelled to resign in order to obviate the alleged disqualification. The law does not require a futile thing; in fact many of the authorities hold that a person is not required to resign as a party simply to qualify the testimony.

*It is obvious here that Lillian Jackson is suing as the representative of her children and our statute makes her a trustee of an expressed trust.*

The case of Begovich v. Begovich, 60 A.L.R. Page 1046, (Wyo.) goes to the right of Mrs. Lillian Jackson to testify.

This Wyoming case holds that a guardian ad litem is not a "party" to an action within the rule excluding testimony as against a person since deceased, but merely a representative of the court.

In re Van Alstine's Estate, 26 U. 193, 72 Pac. 242. One of the parties was Dora S. Van Alstine, guardian ad litem, her testimony as a party defendant was questioned under the statute relating to "parties." To quote:

"\* \* \* By the express terms of said subdivision, the disqualification of persons as witnesses on the ground of interest is limited to such as have a direct interest in the event of the "civil action, suit, or proceeding." Unless, therefore, Mrs. Van Alstine has such an interest, she was not disqualified as a witness. To be directly interested is the same thing as having a direct interest. A direct interest is the opposite of an indirect interest, and excludes the idea of contingency. A direct interest is defined in Winfield's Words and Phrases, p. 195, as follows: 'A direct interest is one which is certain and not contingent or doubtful.' In Black's Law Dictionary it is defined as follows: 'A direct interest, such as would render the interested party incompetent to testify in regard to the matter, is an interest which is certain and not contingent or doubtful.' At common law a contingent liability for costs dependent upon the results of the suit disqualified a witness, but, by the express terms of the subdivision referred to, the common-law rule has been changed, and the disqualification restricted to a direct interest in the event of the suit or proceeding. The remote, doubtful, and contingent liability of Mrs. Van Alstine for costs is not a direct interest, and therefore the court did not err in overruling the objection of the proponent."

It is obvious that Mrs. Van Alstine was a representative of other defendants as guardian ad litem. We can make no distinction between representative of the court testifying and Lillian Jackson in this case, she is a trustee



of an expressed trust under the statute and having no interest is fully competent to testify.

Re Grieve v. Howard (Utah) 180 Pac. 429. Mark Howard, a defendant, was held to be qualified to testify because of the fact that he had no interest, a merely nominal defendant.

In addition to the authorities cited, we have the Utah case of Miller v. Livingstone, 31 U. 415, 88 Pac. 358, and Stats v. Stats, 63 U. 470, 226 Pac. 677, to the effect that where the controversy is between heirs of the decedent as to the division of the property of the estate, all parties to the action, and other interested parties, may testify.

In the case of Doty v. Doty, 2 L.R.A. (NS) 713, it quotes extensively from Kentucky case which analyzes the principles of law involved. We again call the court's attention to the fact that at the time these proceedings first arose there were six minors, ranging in age from 2 to 17 years.

The court says in the Doty case, where they attempted to disqualify the guardian:

“ ‘If she were to resign as guardian on learning that her testimony was necessary to protect his interest, and another were appointed in her stead, she could, after she was removed, and when another had been substituted in her place as guardian, testify for the infant in the action. \* \* \* The action of the county court in appointing a guardian for him, or the failure of the guardian to preserve his interests by resigning, should not be allowed to destroy the infant's rights \* \* \* If

the mouth of the infant's most important witness can be closed by that person's being appointed his guardian, then the rights of infants may be often sacrificed by the statute that was designed for their protection."

The guardian in the Doty case occupies exactly the same position as Lillian Jackson in the instant case, pursuant to agreement between the mother and father of the Jackson children.

(b) ATTORNEY MAY TESTIFY.

The defendant has questioned the right of attorney who drew the will for John Jackson to testify in relation to the drawing of the will made an exhibit to plaintiff's complaint.

It will be observed that counsel for the defendant made no objections to the testimony of the attorney who drew the will of 1920 on the ground of professional ethics, but only upon the ground that the communication between the attorney and John Jackson was privileged and barred under our statute. This question has been decisively answered by our own supreme court in *re Young's Estate*, 94 Pac. 732, 33 Utah 382, which speaks as follows:

"Prof. Wigmore, in his work on Evidence, Vol. 4, No. 2314 in concluding a discussion of the question of privilege, as applicable to an attorney and client in cases of will contests, states the rule as follows: 'But for wills a special consideration comes into play. Here it can hardly be doubted that the execution and especially the contents are impliedly desired by the client to be kept secret during his lifetime, and are accordingly a part of his confidential communications. It must be assumed that during that period the attorney ought



not to be called upon to disclose even the fact of a will's execution, much less its tenor. But, on the other hand, this confidence is intended to be temporary only. That there may be such a qualification to the privilege is plain. That it appropriately explains the client's relation with an attorney drafting a will seems almost equally clear. It follows, therefore, that after the testator's death the attorney is at liberty to *disclose all that affects the execution and tenor of the will*. The only question could be as to communications tending to show the invalidity of the will, i. e., from which a circumstantial inference could be drawn that the testator was insane or was unduly influenced. It may be conceded that the testator would not wish the attorney to assist in any way to overthrow the will.' " (Italics ours.)

\* \* \*

"As to the tenor and execution of the will, it seems hardly open to dispute that they are the very facts which the testator expected and intended to be disclosed after his death; and, with this general intention covering the whole transaction, it is impossible to select a circumstance here or there (such as the absence of one witness in another room) and argue that the testator would have wanted it kept secret if he had known that it would tend to defeat his intended act. The confidence is not apportionable by a reference to what the testator might have intended had he known or reflected on certain facts which now bear against the will."

\* \* \*

"In the following cases the doctrine of privilege between an attorney and client is discussed, and it is held that communications or statements made by the deceased to the attorney preparing the will with respect to the subject-matter thereof

and what the attorney heard or saw with respect hereto do not fall within the privilege." (Citing many authorities).

Then again in the case of *Anderson v. Thomas*, 159 P. 2d 142, Utah, 1945, this case cites the opinion in *Young's Estate* with approval and then says:

"That case involved a wills contest and we held that the privilege did not apply. The reasons for the holding are discussed at length and we believe the opinion to be sound. But it does not appear that even in a will contest case the attorney can testify regarding distinct professional transactions totally unrelated to the preparation of the will."

58 A. J., Sec. 505, Page 283, lays down the rule as follows:

"It may be laid down as general rule that in the absence of anything in the statute governing the privilege, *making it apply to testamentary matters*, communications by a client to the attorney who drafted his will, in respect to that document, and transactions occurring between them leading up to its execution, are not, after the client's death, within the protection of the rule as to privileged communications, in a suit between the testator's devisees and heirs at law, or other parties who claim under him. A reason for this exception is that it cannot be said to be for the interest of a testator, in a controversy between parties all of whom claim under him, to have those declarations and transactions excluded which are necessary to the proper fulfillment of his will." (Italics ours.)

Re *Webb v. Webb* (Utah), 1949, 209 P. 2d 201:

“(6) As to appellant’s contentions that the conversations between attorney and decedent were inadmissible because they were confidential communications between an attorney and client and would have been inadmissible against the interests of the client and were therefore inadmissible against the interests of his legal representatives, it need only be pointed out that even if there were an attorney and client relationship existing between attorney and the decedent, which the attorney denies, claiming only an agency relationship, nevertheless, the conversation would have been admissible under one of the exceptions to that rule since both appellant and respondent were claiming under the client and the intention of the decedent was important in determining what their rights were. See Jones on Evidence 2nd Ed., Sec. 2164 wherein it is stated ‘\* \* \* Thus where, after the death of the client, litigation arises between the parties all of whom claim under the client and the question to be determined is not the existence of a right of action against the estate, but the intention of the decedent as to the creation of various rights which remain ambiguous, the attorney may testify \* \* \*’

Thus an attorney has been permitted to testify in an inquiry to ascertain, as between devisees under the clients will and a grantee claiming under a deed from the client made after the will.’

“From what we have said it follows that the court did not err in admitting in evidence the conversations objected to and that there was therefore sufficient evidence to sustain its findings.”

*Carey et ux. v. Owell et al.* (Washington 1949), 204 P. 2d 193:

“Attorney, who had drawn will and contract for deceased wherein she agreed to bequeath property to her daughter if daughter would look after her was not barred under dead man’s statute from testifying because of his interest in suit for specific performance of the contract by daughter, where prior to commencement of suit, he had not contracted with daughter as to what his fee would be, he had no agreement for contingent fee, and it was understood that a charge would be made for his services at conclusion of the case.”

### POINT I.

#### (c) TRIAL COURT MAY NOT REJECT UNDISPUTED EVIDENCE.

Authorities are legion that trial courts cannot repudiate clear, concise, and undisputed testimony.

20 Am. Jur. 1030, Section 1180:

“Generally, testimony given by a disinterested witness, who is in no way discredited by other evidence, to a fact within his own knowledge, which is not in itself improbable or in conflict with other evidence, is to be believed; and in many cases it is said that the facts so given are to be taken as legally established. It is often said that uncontradicted evidence must be taken as true \* \* \*.”

*Hynes v. White* (Calif.), 190 P. 838:

“The only evidence bearing on the intention of Hay to make the first gift was that of Mrs. White (*the beneficiary of the gift*). A court may not arbitrarily disregard the unimpeached evidence of a single witness. If her statement was true, all the elements of a gift inter vivos were present, and if the gift was made, even though the donor was immediately given absolute pos-

session of the property, it did not militate against the gift.”

*Parker v. Weber County Irrigation District*, 68 Utah 472, 251 . Pac. 11 (1926), page 13:

“The witnesses were not impeached nor their testimony in any particular discredited or contradicted or impaired. The court thus was not at liberty to disregard it and make a finding contrary thereto, which in effect was done by finding that there was no such agreement or understanding as testified to by the witnesses. In other words, the district by undisputed evidence proved. What this court on the first appeal said was a complete defense to plaintiff’s cause, but the court by its finding disregarded such evidence and found contrary thereto; and hence it follows that the finding must be set aside and the judgment based upon it vacated.”

*Harness et al. v. Industrial Commission of Utah*, 115 U. ...., 17 Pac. 2d 277: (1949)

“In the absence of some reasonable basis for disbelieving the uncontradicted evidence offered in support of an application for compensation, the commission may not disregard such evidence. The evidence may, as a matter of law, require an affirmative as well as a negative finding.” (Page 279).

The testimony of Joe Dennis is undisputed and without taint that the W.O.W. certificate was delivered by John Jackson to Lillian Jackson, and that he then and there agreed to make a will, willing to each of his children \$3,500.00, taking credit for the \$1,000.00 W.O.W. certificate, to be deducted from the bequests to the four girls.

Lillian Jackson's testimony is undisputed that John Jackson delivered to her the W.O.W. certificate under circumstances related by Joe Dennis.

The proffered testimony of the attorney who drew the will, which should have been admitted, is undisputed, and this will shows the deductions provided for in the oral agreement, at the time Lillian Jackson signed the marriage settlement of 1918. Take the will of 1920 and account for those deductions in the bequests to the four girls, except as explained by Joe Dennis.

The attorney could not get this information and meet these requirements in any haphazard way, it could only come to the attorney, who drew the will, from John Jackson himself.

The will is evidence of the oral agreement. The oral agreement, in turn, explains the provisions of the will. See authorities cited above.

## POINT I.

(d) SEPARATE WRITINGS RELATING TO SAME SUBJECT SHOULD BE CONSIDERED TOGETHER.

*Searles v. Gonzales*, 216 Pac. 1003 (Cal.):

“There may be instances in which it would be a violation of reason and common sense to ignore a reference which derives its significance from parol proof. On the other extremes are cases which hold that parol evidence is admissible to show that separate writings pertain to the same transaction, for the purpose of establishing the connection by subject matter requisite to incorporate the separate writings under the theory of implied reference hereinbefore stated.”



*Ayoob v. Ayoob*, 168 Pac. 2d 462:

“Failure of writing to make express reference to precedent oral agreement is immaterial. It is sufficient if they both together establish an agreement.”

57 Am. Jur., page 165, Sec. 187:

“Proof of a contract to devise property in consideration of services rendered may be found in a will executed by the promisor and containing a bequest in favor of the person who has rendered services for the testator. In fact, it is said that under such circumstances the instrument is strong corroborative proof of the contract.” Citing *Heatt v. Williams*, 72 Mo. 217, 37 Am. Rep. 438.

57 Am. Jur., page 171, Sec. 193:

“The exercise of equity jurisdiction in the enforcement of a contract to make a will in consideration of services does not proceed upon any distinction between real and personal property, the distinction is in the character of the services.”

*Tigglebeck v. Russel*, 213 Pac. 2d 156 (Ore.):

“\* \* \* The general rule is that, if there is evidence tending to show the existence of a contract, proof of the execution of a will containing a devise or bequest in favor of one who performed services for the testator is corroborative proof of the contract.” (Citing cases).

## POINT II.

### THE COURT MISCONSTRUED THE STATUTE OF FRAUDS AND CONFLICT OF LAWS.

Following the points relied upon, and also following the memorandum decision of the court, we discuss

the question as to whether the Statute of Frauds of the State of California is applicable herein.

The court applied the Statute of Frauds of the State of California in resolving the contract of 1918 entered in the State of California. The court wholly rejects the pleadings and position of the plaintiff that said contract of 1918 was subject to an oral agreement, made at the time the contract of 1918 was entered into.

We reject the Judge's reasoning on this point, as will hereinafter appear.

First let us comment upon the situation: It is true the plaintiff, Mrs. Jackson, had moved to California and it may be said she established a residence there. The contract of 1918 was entered into in the State of California, but supplementing the contract of 1918 was an *oral agreement* which required the conclusion of this contract in the State of Utah. It will be borne in mind that Mrs. Jackson, the plaintiff, requests that John Jackson return to Utah and have Attorney Patterson draw the will which he promised to execute and it will be observed that John Jackson did return to Moab, Utah and executed the will pursuant to his oral agreement; that John Jackson remained in Utah the rest of his life and pyramided his assets of \$24,500.00 to something in excess of \$97,000.00. So it must be observed that Mrs. Jackson had a distinct idea as to where the concluding part of the agreement would be consummated; she may have had particular trust in the Attorney she chose to draw the will; she may have chosen the laws of Utah to



interpret and enforce that will; and she must have known that the bequests of the will would be paid in the State of Utah.

One of the controlling rules in determining the *lex loci* or the *lex fori* turns upon the question of whether the statute of Frauds is substantive or procedural.

Another test rests with the intention of the parties.

Another relates to the question of whether the contract is against public policy.

Another relates to the *citus* of the last act to be performed under the contract.

While we intend to follow the citations of the court in determining the *lex loci* and *lex fori* and cite general authorities thereon, let us make this comment on general questions of law which affect the general jurisdiction on general questions of all states and all jurisdictions. Let us lay down the rule that in our opinion where any state has definitely settled such general questions it is no longer an issue so far as the text writers and annotators are concerned. So we definitely contend that both California and Utah have decided one question in this respect: That both the laws of California and Utah, so far as the statute of frauds is concerned, are procedural and remedial and not substantive and hence controlled by the *lex fori*. To state further, all questions arising in the instant case must be determined by the laws of Utah because California has definitely determined that their Statute of Frauds is procedural. That is to say, that if California and Utah have determined the ques-

tion at issue, as to *lex fori* and *lex loci*, then we are not concerned with general rules laid down by text writers and annotators.

Another familiar rule in determining the state where a contract is entered into is:

“Where the last act is done which is necessary to give the contract validity, is the place of execution of the contract.” Page on Contracts, Vol. 6, page 6180.

Then further:

“Remedies are fixed by the laws of the forum, and parties cannot, by the contract, compel the court to give remedies other than those which are afforded by the system of jurisprudence which the court administers.” Page on Contracts, Vol. 6, page 3617.

So we conclude on this point that the blind adherence of the court below to the “substantive” view was error and, consequently the Utah Statute is controlling and the California Statute of Frauds has nothing to do with this controversy.

The court cites *Crofoot v. Thatcher et al.*, 19 Utah 212, 57 Pac. 171. In reading this case the first thing we find is this:

“Under the issue raised in this case, it is necessary to determine whether the laws of Utah or the laws of Nebraska govern and control in this case. It is conceded that the statute of limitations falls within the remedy, *and the law of Utah controls in so far as the remedy is concerned as applied to an existing and enforceable cause of action.*” (Italics ours).

The above case was dealing with substantive law

of the State of Nebraska.

The court also quoted *Mercantile Company v. Frank* (Calif.), 56 A.L.R. 696, which holds that a chattel mortgage valid in California is valid everywhere. This is substantive law again. A man cannot lose his lien to property just because the property is transferred to another state. It would be the same if the chattel property were stolen and taken into another state.

Again the court quotes *McManus v. Fulton* (Montana), 67 A.L.R. 690. Here again it is substantive law, interpreting the Blue Sky Law which declares certain contracts void.

So it must be observed that whether the forum law controls, turns upon the point as to whether the foreign law is substantive or remedial.

The following California cases hold the Statute of Frauds of California is remedial:

*In re Balfour and Garrette*, 111 Pac. 615. Held:

“Since the Statute of Frauds prescribe merely a rule of evidence going to the enforceability of the contract, a subsequent memorandum could validate the transaction even if it were oral.”

*Warden et al. v. Hutchinson*, 231 Pac. 563. Held:

“The court construing C.C. 1624, subdivision 7, said contracts were not void and the action would lie.”

*O'Brien v. O'Brien*, 241 Pac. 860. Held:

“Contracts falling within the operation of the Statute of Frauds, but made in contravention thereof, are not invalid in the sense that they are void, but are merely voidable.”

*Offman v. Robertson*, 251 Pac. 830. Held:

“Contracts within and in contravention of the Statute of Frauds are voidable, not void. The remedy and not the validity of the contract being affected.”

*Durbin et al. v. Hillman*, 195 Pac. 274. Held:

“Contract was not void but merely unenforceable. We are not called upon to attempt to define the very difficult word “invalid” as used in Section 1624 of the Civil Code, but it is sufficient for our purpose to say that it describes a condition that falls short of being void.”

More recent cases, as shown by citators:

*Leoni v. Delaney* (Calif., 1948), 88 Pac. 2d 765; *Ayoob v. Ayoob* (Calif., 1946), 168 Pac. 2d 462-466; *Brown v. Superior Court*, 212 Pac. 2d 878-81 (Calif.); *Coleman v. Satterfield*, (Calif., 1950), 223 Pac. 2d 61-63; *Monorco v. Le Grecco*, 211 Pac. 2d 363 (Calif.).

Let it also be understood that the subject of public policy is a criterion for determination of the *lex fori* as against the *lex loci*:

It is our contention, as we allege, that the alleged written marriage settlement between plaintiff and John Jackson, standing alone, is wholly against the public policy of both the states of California and Utah.

Here we have a contract which admittedly purports to divide equally the community property acquired by the plaintiff and her husband during marriage. Then we have a husband shunting his wife and seven children from their home in Utah to California, where a marriage settlement is executed, which, construed alone, gives the

wife only one-half the property, to which she is entitled if there were no children, and then imposing upon her the obligation to support and educate the children until they reach their majority without support money or other consideration. We say: That such a contract is against public policy; that without the oral agreement, pleaded by the plaintiff, it cannot be given validity. It requires the oral agreement to make the settlement fair, just and equitable, and we believe it to be the policy of the court to adopt a course which will give legality to such contracts.

The case of *Palmer v. Palmer*, 26 U. 31, 75 Pac. 3, is a case cited by the court, the first syllabus of which reads:

“The principle of comity cannot be invoked to require one state to enforce a contract entered into in another state, where the contract is in contravention of the public policy of the state in which enforcement is sought.”

A reading of the case will verify the syllabus.

In the case of *Mertz v. Mertz*, 108 A.L.R. 1120, the courts of New York refused to enforce a contract entered into in Connecticut between husband and wife because it was in contravention of public policy of New York.

Let us invoke another general rule. That where a husband and wife are dealing with each other in family matters, the husband is bound to the utmost good faith. In this case the wife was not represented by counsel. She had no advice in the marriage settlement, and the attorney who drew the marriage settlement, later became the judge in the divorce action was granted the judge in the divorce action who granted the decree.

No mention of the marriage settlement in the decree of divorce. Never confirmed by any court.

Quoting from 26 Am. Jur., 876:

"The relationship of husband wife is generally regarded as a confidential nature. In many jurisdictions, particularly the community property jurisdictions, statutes expressly provide that transactions between them shall be subject to the general law governing transactions between persons in a confidential relationship \* \* \* the doctrine that fraud may be predicated on unfulfilled promises made with an intention of nonperformance has been applied to promises of one spouse inducing a conveyance to him or her from the other spouse \* \* \*. It is recognized that the most dominant influence of all relations is that of husband over wife, and transactions between them, to be valid, particularly as to her, must be fair and reasonable and voluntarily and understandingly made. Such transactions are jealously scrutinized to prevent the wife from being overreached or defrauded by the undue influence or improper conduct of the husband; and when they are brought about by anything amounting to constructive fraud on his part they are voidable by the wife and are not enforceable against her, at least in equity. At least such transactions are voidable against all persons other than bona fide purchasers. Whenever independent counsel would be of real assistance to the wife in deciding whether to enter into a transaction with her husband, it is his duty to advise her to seek such counsel;

\* \* \*"

*Jorgenson et al. v. Pardee* (California, 1950), 224 Pac. 2d 835:



“\* \* \* Confidential relations are presumed to exist between husband and wife, and in his dealings with his wife the husband, if he obtains an advantage over her, must show that he has not abused the confidence presumably reposed in him by her and resulting from the marital relationship. If the husband fails to bear the burden of showing that the transaction with his wife was fair and just and fully understood by her, the presumption arises that the transaction was entered into by the wife under the undue influence of her husband and was fraudulent.”

*Fernandez v. Aburrea*, 183 Pac. 366, holds that a father has a continuing duty to support his children.

*State v. Supreme Court*, 74 Pac. 2d 888 (Washington), Syllabus:

“Father was under a common law obligation to support his child during its minority and such obligation continued without regard to divorce decree, since parties could not, by divorce decree, stipulate away right of child to support by father.”

*Tremayne v. Tremayne*, 115 Utah ....., 211 Pac. 2d 452: (1949)

Then further:

*Anthony v. Anthony*, 211 Pac. 2d 331 (Calif.):

“Property settlement contracts are binding only when approved by the court.”

*Danz v. Danz*, 216 Pac. 2d 162 (Calif.):

“The duty to provide for children is a matter of public policy.”

### POINT III.

COURT SHOULD HAVE CONSIDERED PLAINTIFF'S PLEA OF ESTOPPEL.

So we will now discuss the question of estoppel under general law and under California law.

Of course, if the court should agree with us that the California law is remedial and not substantive, this argument is surplusage because we would be under Utah law solely.

As heretofore stated, we clearly recognize the principle in this class of case that we must present clear and concise evidence, taking into account every circumstance relating to the transaction, and that we must show a change of position with reference to those claiming under the oral contract and an enrichment to those who would repudiate the oral contract. We, therefore, start with the position of the parties, reiterating:

That by reason of the oral agreement pleaded, the position of the wife was changed in this: She assumed an obligation which was to run for approximately twenty years, an obligation which her husband was compelled as a matter of law to assume, or, at least, a substantial portion of it. She sacrificed her right as beneficiary under W.O.W. insurance, she was tied up for the next twenty years to warrant the care, control, and education of said children; she sacrificed the right to present this question squarely before the court in obtaining fair and just support money against her husband, a present, existing obligation resting upon him. That he was permitted to take the childrens' share of the property, speculate with it at will while she was exhausting her resources to carry the burden, which he was duty bound

to share; that all of this was suffered while relying upon his promise to will to the children \$3,500.00, which he did, but after she had fully performed on her side, he attempted to revoke the contract will, thus defeating his oral promise, upon which she relied. That he fully complied in making the contract will, of which she was fully advised and thus lead to believe that John was acting in good faith.

There were no laches on her part. She did not know the contract will was ever revoked, and she did not know a new will was made until his death. She thus had no opportunity of protecting herself until these acts of repudiation had become manifest.

That he was extremely anxious for her to obtain the divorce must be evidenced from the fact that within less than one year after her decree became final, he came back to Moab, and married another wife, Zinda Cordova, of the age of twenty-one years, and had six children as a result of that marriage.

That the deceased was greatly enriched by the use of the \$24,500.00, the use of which was reserved to him during his lifetime, thus relieving him of the burden of providing for his minor children. He increased the sum from \$24,500.00 to approximately \$100,000.00.

That the enforcement of this oral contract would not be onerous to the second wife or her children since they would have left to them around \$75,000.00. Furthermore, Zinda Jackson is not an innocent party. She knew that John Jackson was the father of these seven children and that he had a legal duty to support them.

49 A.J., Sec. 306, page 617 :

“\* \* \* and in some cases which have considered the fact that the oral agreement has been acted upon the rule has nevertheless been applied. Other cases, however, and this seems to be the majority rule, limit the doctrine to executory modifications. Accordingly, in many cases where the agreement as modified has been acted upon, the rights of the parties have been held to be determined by the modified agreement. This is especially true if there has been what amounts to a part performance, or if both parties have governed themselves by the modified agreement. These courts, while recognizing the general principle that an agreement required by the statute of frauds to be in writing may not be substantially altered by an oral agreement, take the position that parties may not accept the benefits from such alteration and then claim that the transaction is void.”

49 A.J., Sec. 550, page 853 :

“\* \* \* *The courts have repeatedly reiterated that the statute of frauds only applies to executory, as distinguished from executed, contracts; if an oral contract, otherwise within the statute, is completely executed or performed it is taken out of the operation of the statute. This is upon the basis of the often-repeated theory that the statute of frauds was intended to prevent fraud and not to be a cloak for fraud or a means of perpetrating fraud, under this rule of completed performance, suit may be brought upon the contract in a court of law over the objection that the contract was within the statute of frauds.*” (Italics ours).

49 A.J., Sec. 582, page 889 :

## “RELATION BETWEEN DOCTRINE OF ESTOPPEL AND PART PERFORMANCE.—

The doctrine that part performance will take an oral contract out of the statute of frauds rests in its essence upon the ground of estoppel, and it has been said that many of the objections to the doctrine of part performance fall away when it is viewed as an application of principles of estoppel. The doctrine of part performance operates on the theory of estoppel, particularly estoppel by conduct, to a certain extent, and not upon any notion that the court has power to dispense with the statute, or that it *is not as obligatory in equity as at law*. However, this doctrine had its origin prior to and independently of the modern doctrine of estoppel by conduct, and its operation is more extensive than that of the ordinary forms of estoppel; under the doctrine of part performance, a person may not only be precluded from asserting his title or interest in property, but he may even be compelled to make good or to specifically perform his representations. On the other hand, although the acts of one of the parties to an oral contract may be insufficient to amount to part performance, the other party to the contract may be estopped by his conduct to assert the statute of frauds against the contract.” (Italics ours).

19 A.J., Sec. 52, page 656:

Then we find the modification, which in effect holds that the former doctrine is lacking in consideration, Sec. 53, to quote:

“The broad rule stated in the preceding section to the effect that a promise to do or not to do something in the future does not work an estop-



pel must be qualified, since there are numerous cases in which an estoppel has been predicated on promises or assurances as to future conduct. The doctrine of "promissory estoppel" is by no means new, although the name has been adopted only in comparatively recent years. According to that doctrine, an estoppel may arise from the making of a promise, even though without consideration, if it was intended that the promise should be relied upon and in fact it was relied upon, and a refusal to enforce it would result in other injustice. Promissory estoppel is sometimes spoken of as a species of consideration or as a substitute for, or the equivalent of, consideration, but the basis of the doctrine is not so much one of contract with a substitute for consideration, as an application of the general principle of estoppel, since the estoppel may arise although the change of position of the promisee was not in any way an inducement to the promise and was not regarded by the parties as any consideration therefor." (Italics ours).

49 A.J., Sec. 556, page 862:

"Under the rule stated, where one of the parties to an unenforceable oral contract has rendered services thereunder for the other, made improvements on the land of such other party, paid out money to such other party, or has parted with and turned over to the other party property real or personal as the consideration for a promise which the latter refuses to perform, asserting the protection of the statute of frauds, the law will raise an implied promise on the part of the latter to pay for what has been done in the way of performance, holding him liable for the value of the benefits which he has received. A party who has



repudiated his verbal contract cannot invoke the statute of frauds to enable him to retain what he has received of the other party under it in part performance thereof."

There is no attack upon our pleading, no demurrer, no motion was filed in the cause and we distinctly raise the issue of estoppel, as well as fraud.

In the case of *Monsen et al. v. Monsen*, 162 Pac. 90 (Calif.), we find the following:

"A man may make a valid contract, binding himself to dispose of his property in a particular way by will, and a court of equity will enforce such agreement specifically by treating the heirs as trustees and compelling them to convey the property. (Cases cited).

"The requirement of Civ. Code, Sec. 3390, that to be specifically enforced the terms of an agreement must be sufficiently certain to make the precise act which is to be done clearly ascertainable, applied to contracts to dispose of property by will." (Cases cited).

*Notten et al. v. Mensing et al.* (Calif.), 45 Pac. 2d 198:

"Estoppel—it is not necessary to existence of an equitable estoppel that there should exist a design to deceive or defraud, but it is sufficient if person against whom estoppel is asserted by his silence or his representation has asserted a belief of existence of a state of facts which it would be unconscionable to deny.

"Frauds, statute of—Complaint alleging oral agreement of husband and wife to leave property to their respective collateral kindred, making of reciprocal wills pursuant to agreement, husband's death before either will was revoked, wife's

acceptance of benefits under husband's will, wife's revocation of old will and execution of new one in violation of oral agreement, *held* sufficient to raise estoppel to plead statute of frauds. (Civ. Code, Sec. 1624, subd. 6; Code Civ. Proc. Sec. 1973, subd. 6)."

This case involves construction of mutual wills.

In the instant case we have the promise to make a will on the one side, the consideration of which is the services of the wife on the other side in rearing, supporting, and educating the children of husband and wife.

It cannot be denied that the plaintiff has fully performed; it cannot be denied that the deceased, John Jackson, performed to the extent of making a will, pursuant to the mutual understanding between the two.

Now what difference can there be in principle in the issues involved in the case at bar and the making of mutual wills described in the case of *Notten v. Mensing et al.*? Likewise, is there any distinction in the principle involved in the case at bar and *Monsen v. Monsen*, above quoted?

*In re Alexander v. Lewis* (Wash.), 175 Pac. 577, we quote this case because of the simplicity in which contracts relating to testamentary disposition of property are treated. Here we say there is no mystery involved in the case at bar, the only question is, can we prove it or have we proved?

*"There is nothing mysterious or mystifying about contracts to devise by will. They are valid and will be enforced as other contracts, and*

where the promisor has repudiated his contract, and, although such a contract is not broken until death so as to support a cause of action, one court at least has gone so far as to hold that a bill quia timet is available to fix the legal status of property where the promisor has repudiated his contract during his lifetime and has attempted to make other disposition of his property.\* \* \*

‘While the testator may destroy the will or execute another revoking it, the *contract itself cannot be rescinded*, and will be enforced by the court in favor of the person who has acted upon it.’

Underhill on the Law of Wills, Sec. 289.” (Italics ours).

In 106 A.L.R., page 758 we find the rule stated, upon this subject, as follows:

“As pointed out in earlier annotations, it seems that in order that part performance may operate to take a contract of the kind under consideration herein out of the operation of the Statute of Frauds, the services must be exceptional and extraordinary in character, or it must appear that the promisee’s whole course of life would change by performance of the contract.”

Likewise 73 A.L.R., page 1392 again announces the rule:

“\* \* \* The undertaking of each to perform was a sufficient consideration for the promise of the other. That it was oral does not affect its enforcement. *Bird v. Pope*, 73 Mich. 483, 490, 41 N.W. 514. The breach of it by the one cannot but operate as a fraud upon the other. The husband continued to rely upon the contract, and at his death all of his property passes to his wife under his will. While by mutual consent the con-

tract might have been abrogated during the lifetime of the husband, at his death it became an irrevocable obligation on the part of the wife."

In *Goodin v. Castlemen* (N.D.), 200 N.W. 95, we find this language:

"Where a will is made pursuant to a contract for support, in which the party to furnish the support is made the beneficiary, and where such party had entered upon the performance in the manner contemplated, and has not repudiated or broken his obligation, the will may not be revoked so as to deprive him of his contract rights."

Under the instant case we have a contract and full performance throughout lifetime, and likewise full performance by the promisor in that he made the will pursuant to contract, and we insist that any attempt to revoke that will, as to the contractual features, is against all law, equity and justice.

Let us also call the court's attention to the fact that counsel has failed to quote the California statute which gives us relief under the same Statute of Frauds.

Civil Code (Calif.), 1931:

"1623—Contract not in writing, through fraud, may be enforced against fraudulent party. When a contract, which is required by law to be in writing, is prevented from being put into writing by the fraud of a party thereto, any other party who is by such fraud led to believe that it is in writing, and acts upon belief to his prejudice, may enforce it against the fraudulent party."

“1972—Last section not to extend to certain cases. The preceding section must not be construed to affect the power of a testator in the disposition of his real property by a last will and testament, nor to prevent any trust from arising or being extinguished by implication or operation of law, nor to abridge the powers of any court to compel specific performance of an agreement, *in case of part performance thereof*”. (Italics ours).

On the question of fraud, let us say in passing, there is no direct evidence of fraud in the oral promise to make the will, but having made the will he revokes it, which gives vitality to the theory that the entire oral promise was intended to deceive Lillian Jackson and defraud the beneficiaries of the will.

Likewise the delivery of the W.O.W. certificate, while it may have been delivered in good faith and upon the representation that it was a paid up certificate, may not have been, at the time, intended as a fraud, but the later diversion of said certificate to his later wife would relate back to the initial transaction, clearly showing a fraud and a deception practiced upon his first wife.

Let us call the court's attention to the fact that immediately after entering into the marriage settlement and the delivery of the W.O.W. certificate to Lillian Jackson, he wrote the W.O.W. that he had lost the certificate and had another one issued to the four girls. This may have been entirely genuine and done pursuant to the oral agreement, but later, after he married Miss Cordova, this certificate was cancelled and a new one

issued to the new wife. This of itself constitutes a fraud which likewise relates back to the oral agreement.

*Fuller v. Nelle et al.*, 55 Pac. 2d 1248 (Calif.). This case is decidedly involved over a probate court jurisdiction. However, it is stated:

“Testatrix who *orally agreed* with husband not to revoke a mutual will and who, upon the husband’s death, received and accepted the husband’s estate, could not transfer assets of the two spouses in violation of the terms of agreement (oral) with her husband.” (Italics ours).

Also at Page 1250 it is said:

“In view of what has been said above we think it is clear that it becomes wholly immaterial that the probate court found that the purported written revocation was valid, the purported holographic will was valid, and that the defendant Mrs. Nelle was not guilty of duress, fraud, menace, or undue influence. No one of those facts eliminates, or tends to eliminate, the contention that, after Mrs. Fuller had received and accepted the estate of her deceased husband, she was in no position to then transfer the assets of the two spouses in violation of the terms of her agreement with her husband.”

Also observe the discussion of the case of *Aho v.*

*Kusnert*, 87 P. 2d 358 (Cal.) To quote:

“The second count alleged that plaintiffs’ stepfather induced their mother to purchase property with her separate funds in reliance on his representation and promise that plaintiffs should have the property when the mother and stepfather ‘were gone.’ In violation of the promise, he devised the property to the defendant, whom he mar-



ried after the death of the plaintiffs' mother. Despite the fact that the agreement was oral, the court held that the defendant received the property in trust for the plaintiffs. As stated in the opinion: 'By reason of his promise and understanding with plaintiffs' mother Kusnert (the father), upon her death, received title to real property paid for in part by her separate funds and in part by community funds. He broke his promise to her when he devised said property to his second wife. In such circumstances equity, through fastening a trust upon the property, will secure to plaintiffs the benefits of said promise although orally made." 12 Cal. 2d at Page 690.

*Ryan v. Welte* (Cal.) 198 P. 2d 357. This case upholds and enforces an oral agreement to make a will and stresses the point that the Statute of Frauds cannot be imposed to defeat an oral agreement to make a will in his behalf.

It is also an interesting case upon many of the fundamentals of cases of this type. To quote:

"(4-6) Citing the facts in the cases of *Brazil v. Silva*, supra; and *Fuller v. Nelle*, 12 Cal. App. 2d 576, 55 P. 2d 1248, defendants contend that there are no similar allegations of actual fraud in the complaint here. While the word 'fraud' is not used and while the facts here are different than those shown in the cited cases, the complaint does allege the fact that Daniel in complete disregard of his agreement conveyed and devised the property to others than those entitled to it under the agreement. This, as will be pointed out later, constituted constructive fraud. As said in *Notten v. Mensing*, 3 Cal. 2d 469, 45 P. 2d 198, 202: 'In order to raise the estoppel, fraud in some form is essential, but it is not required that an actual

intent to defraud or mislead exist; all that is required is that there exist "a fraud inhering in the consequence of thus setting up the statute." \* \* \* Although in the present case fraud is not alleged as a conclusion, the facts from which that conclusion necessarily follows are alleged."

In the case of *Freemen et al v. River Farms Company* (Cal.) 1936, 44 Pac. 2d 199, the plaintiff here sued on an oral promise that the president of the defendant company promised to take up bonds of the corporation and cash them and pay for repair work on its ditches.

The defendant pleaded the Statute of Frauds (Civil Code, Sec. 1624, subdivision 4). The court held, however, that the work was fully performed and that it was necessary work for the corporation and held that the Statute of Frauds had no application.

In the case of *Grant v. Long et al* (Cal.), 92 P. 2d 940. Quoting from the syllabus which is strictly followed by the opinion of the court.

"Frauds, Statute of—The fundamental rule, that as the statute of frauds is designed to prevent fraud it cannot be invoked to perpetrate a fraud, is based on the doctrine of estoppel and is applied in cases in which one party in reliance on a parol contract that should have been reduced to writing has changed his position or parted with value so that it would be an injustice to permit the other party to plead the statute of frauds."

The court said the contract had been fully performed for many years and the defendant was estopped to set up the Statute of Frauds.

*Mayborne v. Citizens' Trust & Savings Bank*, (Cal.) 1920, 188 Pac. 1034. While this case deals with quantum meruit it has some interesting features of the case at bar.

Quoting from syllabus:

"Work and Labor — That Payment Would be Equitable Considered in Determining Intent to Pay. In an action against the estate of a deceased person to obtain value of services rendered, it was proper for the trial court, in determination of intention of parties, to weigh the circumstance that it would be just and equitable for plaintiff to be rewarded for her services.

"Limitation of Actions—Statute does not Run Against Action for Services Under Contract for Indefinite Time. Where a contract to pay for services, express or implied, is for an indefinite time, and no time for payment is specified, the statute of limitations does not begin to run until the services end."

*Burrows v. Burrows et ux*, (Cal.), 22 Pac. 2d 1072, 1934. This is another case in point but emphasizes one particular feature of our case and that is in dealing with family relations the master mind of the family cannot hold benefits conferred by others in such relationship unless such others had independent advice.

This case likewise was taken out of the Statute of Frauds by reason of oral promises.

*Jones v. Clark*, (Cal.) 119 P. 2d 731, 1941. This case was mentioned by court or counsel in the oral argument but refers specifically to specific performance which was disallowed by the court.

It lays down the doctrine that mutuality of remedy applies only to executory contracts and not executed contracts, as in the case at bar.

*In re Brown v. Superior Court*, (Cal.), 212 P. 2d 881, 1949. This case is not only in point generally but goes specifically to the point of right of party to revoke a will:

“It is argued by respondent that petitioner has not shown an actual or potential cause of action because he has not alleged that the contract between George and Abigail contained an express agreement not to revoke the mutual wills. It is not necessary, however, that there be an express agreement to this effect in order to enforce a contractual obligation to leave property to designated persons at death. In every contract there is an implied covenant of good faith and fair dealing that neither party will do anything which injures the right of the other to receive the benefits of the agreement. (Citing 128 P. 2d 665 (Cal.), 177 P. 2d 931 (Cal.) Where the parties contract to make a particular disposition of property by will, the agreement necessarily includes a promise not to breach the contract by revoking the will and failing to dispose of the property as agreed. The rights of the parties depend upon the contract, and the revocation of the will or other breach of the contract does not prevent the intended devisees or legatee from enforcing the contractual obligations.” (Citing many authorities).

*In re Sargavak's Estate*, 216 P. 2d 850. (Apr. 1950):

“Declarations made by a testator at, before

or after execution of an instrument are admissible, if offered for the purpose of ascertaining the intent with which instrument was executed and not for purpose of proving the meaning testator attributed to specific provisions of an admitted will."

*Monarco v. Lo Greco*, 220 P. 2d 737, (Cal.), 1950. This case assembles and correlates nearly every case that has come before the Courts of California. This action was for services rendered and held to be of peculiar and unusual character.

After oral agreement that he would be given one-half interest in the Estate property, we find that one Christie, on promise of the inheritance, worked diligently in the family venture. He gave up any opportunity for further education or any chance of accumulating property of his own. He received only his room and board and spending money. When he was married and suggested the possibility of other employment to support his wife, he was told to move into the family, that he, Christie, need not worry for he would receive the property when Natale and Carmela died. The property increased in value to \$100,000.

The court held that the oral promise to make a will was good and that he was entitled to the property. The opinion holds:

"The controlling question is whether plaintiff is estopped from relying upon the statute of frauds (Civil Code No. 1624; Code Civ. Proc. No. 1973) to defeat the enforcement of the oral contract. The doctrine of estoppel to assert the statute of frauds has been consistently applied by the courts of this state to prevent fraud that would



result from refusal to enforce oral contracts in certain circumstances. *Such fraud may inhere in the unconscionable injury that would result from denying enforcement of the contract after one party has been induced by the other seriously to change his position in reliance on the contract,* \* \* \*'' (Quoting many cases.) (Underscoring ours).

The above case is worthy of serious consideration, it goes into the questions of fraud, specific performance, quantum meruit, and oral contracts and clearly shows the change and progress in theory in the recent California cases and the earlier ones on these questions.

*Walker v. Calloway*, 222 P. 2d 455, (Cal.) 1950. This case closely follows *Monarco v. Lo Grece*. It is an action for specific performance of an oral agreement to will decedent's entire estate to the plaintiff in consideration for services rendered decedent. After making the promise to will, the property was willed to another. The plaintiff was formerly the wife of decedent and they lived separate and apart. She was induced to return from Michigan to California to nurse and care for the deceased by reason of the oral promise to will his property to her.

In its opinion the court says:

"Where a contract is within the statute of frauds, as it is here, Civ. Code, sec. 1624 (6); Code Civ. Proc. sec. 1973 (6), the mere rendition of services is not usually such a part performance of a verbal agreement as will relieve the contract from the operation of the statute, but 'if the serv-



ices are of such a peculiar character that it is impossible to estimate their value by any pecuniary standard, and it is evident that the parties did not intend to measure them by any such standard, cases the reason for the interposition of equity is quite obvious. Plaintiff has rendered service of extraordinary and exceptional character—such service as, in contemplation of the parties, was not to be compensated for in money, and, as in contemplation of law, cannot be compensated for in money. Therefore by no action at law could a plaintiff be restored to his original position. It would be in the nature of a fraud upon him to deny him any relief, and, the law failing by reason of its universality, equity, to promote justice, makes good its imperfections. Wat. Spec. Perf. Cont. sec. 41; Pom. Spec. Perf. sec. 114. *Owens v. McNally*, 113 Cal. 444, 450, 45 P. 710, 712, 33 L.R.A. 369; *McCabe v. Healy*, 138 Cal. 81, 70 P. 1008; Anno. 69 A.L.R. 14, 120, et seq; 106 A.L.R. 742, 756, et. seq.”

Likewise this case lays down all the necessary requirements for proof in such action and thoroughly analyzes dozens of California cases on the subject, finally holding that the plaintiff is entitled to a new trial under the peculiar circumstances of the case.

It will be observed, also, that the services of the plaintiff were of short duration, from May 1947 to January 6, 1948.

*Berkey v. Hahn*, 224 P. 2d 885. (Dec. 1950). At page 889:

“Where a party to an oral contract has been induced by the other party seriously to change his position in reliance upon, or in performance of the contract, and would suffer an unconscionable injury if it were not enforced, or if unjust enrichment would result \* \* \* the doctrine of estoppel will be invoked and the statute of frauds will not be available to perpetuate the fraud. \* \* \*”

This case refers to *Monarco v. Lo Greco* as the latest expression of the Supreme Court on the subject.

### CONCLUSION

Based upon the foregoing facts and authorities we most earnestly contend that:

1—The Trial Court should have admitted the testimony of the Plaintiff in relation to the oral agreement with the deceased, John Jackson, respecting the willing of parts of his estate to the children of both plaintiff and John Jackson.

2—The Trial Court should have received all the testimony of attorney, Knox Patterson.

3—The Trial Court should not have rejected the undisputed testimony of the witness Joe Dennis and other undisputed testimony.

4—The Trial Court should have considered separate writings which related to each other and bore out the oral testimony offered in the case.

5—The Court misconstrued the Statute of Frauds and Conflict of laws in relation to the case at bar.

6—The Trial Court should have considered plaintiff's plea of Estoppel to defendant's plea of the Statute of Frauds.

Finally we contend that judgment should be ordered by this court as prayed for in plaintiff's complaint, upon the facts and the law of the case, or at the very minimum, that the case be remanded for a new trial with instructions to admit all the above mentioned testimony offered by the plaintiffs and to enter judgment accordingly.

Respectfully submitted,

KNOX PATTERSON,

O. A. TANGREN,

*Attorneys for Plaintiff*

Address : 205 Boston Building,  
Salt Lake City, Utah