

1952

## Lillian Jackson v. Zinda Jackson : Brief of Respondent

Utah Supreme Court

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Mitchell Melich; Ruggeri and Gibson; Attorneys for Defendant and Respondent;

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# In The Supreme Court of The State of Utah

LILLIAN JACKSON,

Plaintiff,

—vs.—

SINDA JACKSON, Executrix of the  
Estate of JOHN JACKSON, deceased,

Defendant.

CIVIL

No. 7793

## Brief of Respondent

**FILED**

MAR 27 1952

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# In The Supreme Court of The State of Utah

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LILLIAN JACKSON,

Plaintiff,

—VS.—

SINDA JACKSON, Executrix of the  
Estate of JOHN JACKSON, deceased,

Defendant.

CIVIL

No. 7793

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## Brief of Respondent

### STATEMENT OF THE CASE

In view of the manner in which plaintiff has made her statement of facts, we deem it necessary to make the following statement of facts in this case.

Lillian Jackson is the plaintiff in this action. Lillian Jackson and John Jackson were married March 5, 1896. Seven children were born the issue of said marriage. On the 22nd day of April 1918, Lillian Jackson, John Jackson and their children were, and for some considerable time prior thereto had been, residents of and domiciled at Orland, Glenn County, State of California. Their marriage was not entirely happy and finally ended in a separation and a divorce.

On the 22nd day of April, 1918, at Orland, Glenn County, State of California, Lillian Jackson and John Jackson en-

tered into a written agreement, by the terms of which they divided up their property, made a full and complete settlement of all matters pertaining to and resulting from the marriage contract and separated.

Said written agreement, so made, is attached to and made a part of the plaintiff's Complaint as Exhibit 2 (R. page 8 to 14). Said agreement is set forth in full in the Court's Findings of Fact (R. page 124 to 130). Lillian Jackson is the First Party and John Jackson is the Second Party to said written agreement of April 22, 1918.

Lillian Jackson received as a result of said agreement, the sum of approximately \$28,689.00, which sum was a little more than half of all property owned by John Jackson, and in consideration thereof she agreed with John Jackson in said written agreement, among other things, as follows:

" - - - - -

"WHEREAS, said first party contemplates and is about to commence and prosecute an action for divorce from and against said second party - - -

" - - - - -

"WHEREAS in anticipation of such proceedings of divorce being instituted by said first party against said second party, it has been deemed to the interest of the aforesaid parties hereto and to their children, that a property adjustment be at this time made and entered into, whereby a division of all of the properties, now owned and held by the parties hereto, be made to the entire satisfaction of the aforesaid parties and all persons concerned.

"NOW THEREFORE this agreement made and entered into by and between the parties afore-



said, whereby for and in consideration of the covenants hereinafter contained, and the payment, conveyances, transfers, assignments, etc. hereinafter set forth and specified, and all other considerations hereinbefore had and received by and between the parties aforesaid each to the other, does hereby forever release the other from any future claim or demand of either personal or property interests held by the other, either legally or morally, growing out of and by reason of the aforesaid parties hereto being or having been lawfully married.

“It being the intention of these presents and the contract hereinby entered into and the considerations herein specified, that the said party of the first part shall and will not make any further demand of property division or interests in any proceeding at law or otherwise, growing out of or by reason of any action of divorce, said first party may institute and prosecute. And the property division hereinafter specified is and shall be in full settlement as complete adjustment of any claim or right whatsoever, either legally or morally said first party shall or may have upon said second party, or upon any of his property, as well as any claim or right, legally or morally that the childred above mentioned shall or may have therein save and excepting as hereinafter specified.

“As a further consideration herein, the said party of the first part hereby promises and agrees that she will, and hereby does assume and agree to the sole and entire support hereafter of all of the following mentioned minor children, namely: Jesse Jackson, Fanny Jackson, Eldiva Jackson, Glenn Jackson, and Josephine Jackson, and it is understood and agreed that the said party of the first part shall have and be decreed the custody of the aforesaid minor childred, and said first party further agrees that she will properly provide for, educate and care for all of said minor childred to their majority; and further, said party of the first part hereby does and agrees to assume all legal



and moral responsibility for the care and bringing up of said minor childred.

“And said party of the second part hereby agrees to assume and provide for the support, education, and care of John Jackson, Jr. until he shall reach his age of maturity. And it is hereby expressly understood and agreed that said party of the second part shall at all times hereafter have the custody of said John Jackson, Jr., and hereby assumes all moral and legal responsibility for the support, education, and care of said Minor child, John Jackson, Jr.

The said party of the first part further agrees that in event of the institution and prosecution of an action for divorce from said second party, that she shall bring such action and prosecute the same at her own and sole cost and expense, and that in or under or by virtue of such action, or any supplementary proceedings had therein, she shall and will not ask or demand of or from said second party any alimony or costs of action or any support or demand for and in behalf of any of the aforesaid minor childred to be in her custody, and of which she has assumed the responsibility of the care and education of.

“It is hereby further understood and agreed that the said party of the second part shall not hereafter be responsible or liable for any debts or obligations incurred by said first party or any of the minor children in her behalf, from the date hereof.

“The said party of the first part further agrees not to make any demand or request for the support, aid, or succor for herself or her minor children, upon said second party, and said second party agrees to live separate and apart from said first party and not in any way interfere with or molest her, or any of the children to be left in her custody.” - - - - -”

Said written agreement was sworn to by Lillian Jackson and John Jackson on the 22nd day of April, 1918 at Orland, Glenn County, State of California, before H. W. Blichfeldt, a Notary Public in and for Glenn County, California.

John Jackson thereafter moved from Orland, California, to Moab, Utah. On the 20th day of December, 1919, Lillian Jackson, in the Superior Court of the State of California, in and for Glenn County, obtained an interlocutory decree of divorce from John Jackson (Plaintiff's Exhibit C) and on the 22nd day of January, 1921, said interlocutory decree of divorce was by final decree made final (Plaintiff's Exhibit D).

On the 7th day of September, 1920, at Moab, Utah, Knox Patterson of the then law firm of Patterson and Constantine prepared a Will for John Jackson (Plaintiff's Exhibit I) which is set forth in full in the Court's Findings (R. page 138 to 140.) On September 8th, 1920, Patterson and Constantine, by Geo. J. Constantine, mailed said Will by letter (Plaintiff's Exhibit H) to Mrs. Belle Dennis at Orland, California. In said Will of September 7, 1920, (Plaintiff's Exhibit I) John Jackson bequeathed his estate as follows:

**"ARTICLE I.** I give and bequeath to the seven children of my marriage with Lillian Jackson as follows:

" (a) To my daughter, Mrs. Belle Dennis, now of the age of 24 years the sum of Three Thousand Two Hundred and Fifty (\$3,250.00) Dollars; she also to receive as beneficiary in my insurance policy with the Woodmen of the World to the extent of Two Hundred and Fifty Dollars.

“ (b) To my son, Jesse Jackson, now of the age of 22 years, the sum of Thirty Five Hundred (\$3,500.00) Dollars.

“ (c) To my son, John Jackson, now of the age of 18 years, the sum of Thirty Five Hundred (\$3500.00) Dollars.

“ (d) To my daughter Fannie Jackson, now of the age of 16 years, the sum of Three Thousand Two Hundred and Fifty (\$3,250.00) Dollars, she also to receive as beneficiary in my insurance policy with the Woodmen of the World to the extent of Two Hundred and Fifty Dollars.

“ (e) To my daughter, Aldiva Jackson, now of the age of 11 years, the sum of Three Thousand Two Hundred and Fifty (\$3,250.00) Dollars, she also to receive as beneficiary in my insurance policy with the Woodmen of the World to the extent of Two Hundred and Fifty Dollars.

“ (f) To my son, Glen Jackson, now of the age of 8 years, the sum of Thirty Five Hundred (\$3,500.00) Dollars.

“ (g) To my daughter, Josephine Jackson, now of the age of 6 years, the sum of Three Thousand Two Hundred and Fifty (\$3250.00) Dollars; she also to receive as beneficiary in my insurance with the Woodmen of the World to the extent of Two Hundred and Fifty (\$250.00) Dollars.

“IN THE EVENT any of my said daughters shall die leaving surviving her no issue of her body, then and in that event the share she would have been entitled to shall be divided share and share alike between my children surviving her.

IN THE EVENT any of my said sons shall die leaving surviving him neither wife nor children, then and in that event the share he would have been entitled to shall be divided share and share alike between my children surviving him.

**"ARTICLE II.** I hereby nominate, constitute and appoint my daughter, **MRS. BELLE DENNIS** the sole executrix of this will and testament and direct that she qualify and serve as such executrix without bonds or securities whatever, whether in the State of Utah, or elsewhere.

**"ARTICLE III.** In order that no misunderstanding can arise I hereby state that at the time of my divorce from my former wife, Lillian Jackson, I fully settled with her in every particular and therefore the said Lillian Jackson shall in no way participate in, nor is she entitled to any interest whatsoever in my estate."

Said Will was witnessed by Attorney Knox Patterson and Attorney Geo. J. Constantine, the two lawyers constituting the law firm of Patterson and Constantine.

Attention is called to the fact that no provision whatsoever is made in the Will as to what disposition was to be made of the remainder of the property of John Jackson, other than as bequeathed to his children as aforesaid. There is no residuary clause in said Will. Said Will, therefore, not only leaves to said children \$3500.00 each, but leaves the entire estate of John Jackson to said children.

On October 3, 1921, John Jackson married Sinda Jackson. Sinda Jackson is the Executrix of the Last Will and Testament of John Jackson, deceased, and the defendant in this action. Six children were born of this marriage.

Their names and date of birth are as follows:

Jim Jackson, born December 14, 1924.

Opal Jackson Lemon, born April 29, 1928.

Ellesa Jackson Day, born February 20, 1932.

Alice Jackson, born December 24, 1935.

Joe Jackson, born June 13, 1938, and

Jack Jackson, born January 24, 1941.

All of said children are living and are residents of Utah. Alice, Joe and Jack Jackson, three of said children, were dependent upon John Jackson at the time of his death for all of their support, education and maintenance and are now completely dependent upon his estate for their support, education and maintenance.

On the 9th day of December, 1946, John Jackson made his Last Will and Testament. Said Will is set forth in full in the Court's Findings (R. pages 141 to 143). See also (R. page 220). By said Will John Jackson devised and bequeathed one-half of all of his estate, real, personal and mixed, to his wife, Sinda Jackson. In paragraph third of said Will John Jackson provides for each of his children by his first marriage as follows:

“Third.—I give, and bequeath to the six surviving children of my marriage with Lillian Jackson, namely: Belle Dennis, my daughter; Jesse Jackson, my son; John Jackson, my son; Aldiva Jackson, my daughter; Glen Jackson, my son and Josephine Jackson, my daughter, the sum of one thousand dollars (\$1000.00) each.”

All of the rest, residue and remainder of his estate he gave, devised and bequeathed to the children of his marriage with Sinda Jackson, namely, Jim Jackson, Opal Jackson, Ellesa Jackson, Alice Jackson, Joe Jackson and Jack Jackson, share and share alike. He appointed Sinda Jackson Executrix of his Last Will and Testament to serve without bond.



In the seventh paragraph of his Will John Jackson provides as follows:

“Seventh.—I hereby revoke all former wills and testamentary dispositions by me at any time made.”

John Jackson died May 1, 1950, at Moab, Grand County, Utah. At the time of his death he was a resident of Grand County, State of Utah. The Last Will and Testament of John Jackson, dated December 9, 1946, was duly admitted to probate by the District Court of Grand County, State of Utah, on the 2nd day of June, 1950. On said date Sinda Jackson was regularly appointed the Executrix of said Last Will and Testament and she is now and ever since the 2nd day of June, 1950, has been the duly appointed, qualified and acting Executrix of the Last Will and Testament of John Jackson, deceased.

On September 1, 1950, Lillian Jackson, for the benefit of herself and her children (the children of John Jackson, deceased, and Lillian Jackson), namely: Belle Dennis, formerly Belle Jackson, Jeanne Raab, formerly Aldiva Jackson, Fanny Jackson, a deceased daughter, Joyce McKee, formerly Josephine Jackson, Jesse Jackson, John Jackson and Glen Jackson, filed a claim against Sinda Jackson as the Executrix of the Last Will and Testament of John Jackson, deceased, for the sum of \$24,500.00. A copy of said claim is attached to and made a part of plaintiff's complaint as Exhibit I (R. page 5 to 7).

In said claim so presented to Sinda Jackson, as aforesaid, Lillian Jackson claims that at the time she made and

entered into the written agreement of April 22, 1918, above mentioned, at Orland, Glenn County, State of California, she:

“ - - informed John Jackson, her husband, that she would not accept said agreement on a basis of a 50-50 split on their community property and at the same time assume all responsibility for care, control and education of said five (5) children. Whereupon said John Jackson agreed to and with the claimant in addition to the property so awarded to her under said agreement of April 22, 1918, he would make a will to all of his children bequeathing to them the sum of \$3500.00 each.”

Said alleged agreement to make a will and bequeath \$3500.00 to each of the plaintiff's children is an oral agreement claimed by plaintiff, Lillian Jackson, to have been made contemporaneously with and at the time that the written agreement of April 22, 1918, was made and entered into. There is no writing whatever evidencing such agreement signed by John Jackson nor by his agent duly authorized. Said alleged oral agreement of John Jackson to make a will bequeathing \$3500.00 to each of his children is in direct contradiction to the written agreement of April 22, 1918, above mentioned, and is an attempt to add to, alter and change the terms of said written agreement.

Said claim so presented by Lillian Jackson was rejected by the Executrix of the Estate of John Jackson, deceased, and on the 30th day of November, 1950, Lillian Jackson filed this action against Sinda Jackson, Executrix of the Estate of John Jackson, deceased, to enforce the terms of said alleged oral agreement to bequeath \$3500.00 to each of Plaintiff's children, instead of the \$1000.00 bequeathed to each of said children by the will of December 9, 1946.



## STATEMENT OF POINTS RELIED UPON

### POINT I

PLAINTIFF'S AMENDED COMPLAINT DOES NOT STATE FACTS SUFFICIENT TO CONSTITUTE A CAUSE OF ACION.

### POINT II

THAT THE CAUSE OF ACTION IS BARRED AGAINST THE REAL PARTIES IN INTEREST BY SECTIONS 102-9-4 and 102-9-9, U.C.A. 1943, AND IS THEREFORE BARRED AGAINST THE PLAINTIFF WHO CLAIMS TO SUE AS THE TRUSTEE OF AN EXPRESS TRUST.

### POINT III

THE COURT DID NOT ERR IN EXCLUDING THE EVIDENCE OF:

- (A) THE TESTIMONY OF PLAINTIFF, LILLIAN JACKSON.
- (B) THE TESTIMONY OF KNOX PATTERSON.
- (C) THERE WERE NO SEPARATE WRITINGS RELATING TO THE SAME SUBJECT WHICH COULD BE CONSTRUED TOGETHER TO BE ADMITTED.

### POINT IV

THE COURT DID NOT MISCONTRUE THE STATUTE OF FRAUDS AND THE CONFLICT OF LAWS.

### POINT V

THE COURT DID NOT ERR ON THE QUESTION OF PLAINTIFF'S PLEA OF ESTOPPEL.

## ARGUMENT

## I

PLAINTIFF'S AMENDED COMPLAINT DOES NOT  
STATE FACTS SUFFICIENT TO CONSTITUTE  
A CAUSE OF ACTION.

Plaintiff's Amended Complaint was filed February 15, 1951, (R. page 32).

The question of whether the Amended Complaint stated a cause of action was argued to the Court at the pre-trial sessions of the Court. The Trial Court in its Pre-Trial Order dated March 23, 1951, made the following Order:

“BY THE COURT: It is ordered on motion of of Mr. Patterson that all references to quantum meruit or the reasonable value of the service rendered by the plaintiff to the said John Jackson, deceased, be stricken and eliminated from this case.” (R. page 93).

The Trial Court in its Pre-Trial Order dated April 3, 1951, ordered that one of the issues to be resolved by the Court was:

“Defendant reserves his defense that the Complaint does not state a cause of action.” (R. page 99).

In view of the stipulation of Counsel and the express ruling of the court, we are unable to understand plaintiff's statement found at page 49 of her brief which reads as follows:

“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."

Plaintiff sets forth in full as part of her Complaint the written agreement of April 22, 1918, (R. page 8). By said written agreement plaintiff assumed all responsibility for the care, control and education of her children. She received under said written agreement as compensation therefor, \$28,689.00; said sum so received by her is admittedly half if not more than half, of all of John Jackson's property. The Complaint in this action is based upon an alleged oral agreement made at the same time and contemporaneously with the making of said written agreement. Plaintiff claims that John Jackson by said oral agreement, agreed to "make a Will to his children bequeathing to them \$3500.00 each", in consideration of plaintiff assuming all responsibility for the care, control and education of said children. This alleged oral agreement is in direct conflict with the plain and unequivocal terms of the written agreement of April 22, 1918.

In the face of said written agreement and the consideration therein set forth and fully received by the plaintiff for taking care of her children there certainly was no consideration for the alleged oral agreement to make a will and leave to the plaintiff's children \$3500.00 each in consideration of the plaintiff taking care of the children because she had already agreed in writing to do that very thing, and was paid in full for so doing. We conclude that there was no consideration whatsoever for the alleged oral agreement. The Amended Complaint for this reason, therefor, does not state a cause of action.

Defendant pleaded as a defense to the plaintiff's original Complaint the California Statute of Frauds, Section 1973, California Code of Civil Procedure and Section 1624, Civil Code of California, (R. pages 22 to 25). In view of the pleaded defense of the California Statute of Frauds, plaintiff voluntarily amended her Complaint in an attempt to meet the objections of the pleaded Statute of Frauds. Plaintiff in this regard at page 6 of her brief states:

"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."

Plaintiff at page 12 of her brief states:

"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. (Emphasis ours.)

The court's attention is called to the fact that plaintiff in her brief, spends 20 pages, pages 43 to 63 inclusive, arguing that the "Court should have considered plaintiff's plea of estoppel." Her complaint was amended to bring her within the equity jurisdiction of the court. The action could be nothing other than an action of specific performance of the alleged oral contract. Plaintiff's amended complaint fails to state a cause of action.

Loper vs Flynn 165 P. 2d 256 (Cal.)  
 De Mattos vs McGovern 77 P. 2d 522 (Cal.)  
 Beard vs Melvin 140 P. 2d 720 (Cal.)  
 Murdock vs Swanson 193 P. 2d 81 (Cal.)  
 Shive vs Barrow 199 P. 2d 693 (Cal.)

See also the case of Andrews vs Aikens 44 Ida. 797, 260 P. 423, 69 A.L.R. and the extensive annotation covering approximately 204 pages immediately following the said case. The annotation begins at 69 A.L.R. 14 and concludes at page 219.

We also refer the court to the many other cases on this question cited by us in our brief.

We also claim that the complaint does not state a cause of action against the defendant because there are no sufficient or any allegations in the plaintiff's amended complaint showing how or in what manner the plaintiff is the trustee of an express trust.

We believe that what we have said above should dispose of this case without the consideration of any of the other questions raised by the plaintiff in her brief and that the judgment of the lower court should therefor be sustained because:

Plaintiff's amended complaint does not state facts sufficient to constitute a cause of action.

## POINT II

THAT THE CAUSE OF ACTION IS BARRED AGAINST THE REAL PARTIES IN INTEREST BY SECTIONS 102-9-4 and 102-9-9, U.C.A. 1943, AND IS

THEREFORE BARRED AGAINST THE PLAINTIFF WHO CLAIMS TO SUE AS THE TRUSTEE OF AN EXPRESS TRUST.

Our argument with respect to Point II appears at pages 33 to 38 inclusive of this brief. We refer this court therefore for our argument on this point, to the above pages.

### POINT III

THE COURT DID NOT ERR IN EXCLUDING THE EVIDENCE OF: (A) THE TESTIMONY OF PLAINTIFF, LILLIAN JACKSON.

At the outset may we state that we made five objections to the testimony of the plaintiff Lillian Jackson, ex-wife of the deceased John Jackson at the time she was on the witness stand. Said objections so made are as follows:

(1) That the plaintiff, Lillian Jackson, is an incompetent witness under the provisions of Section 104-49-2 (Subsection 3) Utah Code Annotated 1943, now Section 104-24-2, Sub-section 3, Chapter 24, of Chapter 58, Session Laws 1951, commonly known as the "Dead Man Statute." (R. page 202).

(2) That under the provisions of Section 1973, California Code of Civil Procedure, an agreement which by its terms is not to be performed during the lifetime of the promissor, or an agreement to devise or bequeath any property or to make any provision for any person by will is invalid unless the same or some note or memorandum

thereof be in writing and subscribed by the party to be charged or by his agent and evidence therefor of the agreement cannot be received without the writing or secondary evidence of its contents. (R. page 201).

(3) That under the provisions of Section 1624, Civil Code of California, an agreement which by its terms is not to be performed during the lifetime of the promisor or an agreement to devise or bequeath any property or to make any provision for any person by will is invalid unless the same or some note or memorandum thereof is in writing and subscribed by the party to be charged or his agent. (R. page 202).

(4) That the testimony of Lillian Jackson is an attempt to alter, vary, contradict and change the contents of a written instrument to wit: Plaintiff's Exhibit 2 which is attached to and made a part of the plaintiff's Complaint (R. page 8 to 14), and which agreement is set forth in full in the Findings (R. page 124 to 130).

(5) That plaintiff's Complaint fails to state a claim against the defendant upon which relief can be granted. (R. page 202).

Counsel for the plaintiff, in his brief, disregards all of the objections made to the testimony of the plaintiff, Lillian Jackson, except one which is objection (1) above. He says that Lillian Jackson is not an incompetent witness under the "Dead Man Statute" because she is suing in a representative capacity, to-wit: As trustee of an express trust under Section 104-3-1, Utah Code Annotated 1943, but which actually should be Rule 17 (a), Utah Rules of Civil Procedure.



We contend that the objections made to the testimony of the plaintiff and the objection that plaintiff is an incompetent witness are well taken and should each be sustained.

(1) Is the plaintiff an incompetent witness under the "Dead Man Statute?"

We say she is.

This is an action by Lillian Jackson, the ex-wife of the deceased, John Jackson, as plaintiff, against Sinda Jackson, Executrix of the Estate of John Jackson, deceased. Sinda Jackson is the surviving widow of John Jackson, deceased, and she is the Executrix of the Last Will and Testament of John Jackson, deceased. Sinda Jackson as the representative of the Estate of John Jackson, deceased, is sued as defendant by this plaintiff. Lillian Jackson is the plaintiff and she is also the witness under consideration in this case. Lillian Jackson as plaintiff and as witness is opposing and suing the representative of the estate to the extent that she is seeking by her action and testimony to take away from the estate the sum of \$24,500.00; Sinda Jackson, the executrix and representative of the estate, the defendant herein, is protecting the integrity of the estate.

Section 104-49-2 (Sub-section 3), Utah Code Annotated 1943, now Section 104-24-2 (Sub-section 3), Chapter 24 of Chapter 58, Session Laws 1951, hereinafter referred to as the "Dead Man Statute" reads in part as follows:

“Who May Not Be Witnesses - - -

(3) **A party to any civil action, suit or proceeding, and any person directly interested in the event thereof, and any person from, through or under whom such party or interested person derives his interest or title or any part thereof, when the adverse party in such action, suit or proceeding claims or opposes, sues or defends, as guardian of an insane or incompetent person, or as the executor or administrator, heir, legatee or devisee of any deceased person, or as guardian, assignee or grantee, directly or remotely, of such heir, legatee or devisee, as to any statement by, or transaction with, such deceased, insane or incompetent person, or matter of fact whatever, which must have been equally within the knowledge of both witness and such insane, incompetent or deceased person, unless, such witness is called to testify thereto by such adverse party so claiming or opposing, suing or defending, in such action, suit or proceeding.”**

The above section expressly makes incompetent as a witness, “a party to any civil action, suit or proceeding,” and it would seem clear that Lillian Jackson, who is both plaintiff and witness in this case, by the plain language of the statute is an incompetent witness under said statute.

Counsel in his brief argues in substance that the language “a party to any civil action, suit or proceeding” has a special meaning and that the word “party” doesn’t mean “party to a law suit,” because plaintiff is suing as the “trustee of an express trust.”

It is our contention that the statutory disqualification as a witness of a person who is “a party to any civil action, suit or proceeding” means what it says; that is, that the party to said suit is disqualified and incompetent as a witness. This section of the “Dead Man Statute” makes incom-

petent as a witness a party to any civil suit or proceeding. It makes no difference whether the party witness is plaintiff or defendant.

Ewing vs. White, 8 Utah 250, 30 Pac. 984.

Hennefer vs. Hays, 14 Utah 324, 47 Pac. 90.

Kimball vs. McCornick, 70 Utah 189, 259 Pac. 313.

Clark vs. Clark, 74 Utah 290, 279 Pac. 502.

In the case of Clark vs. George, 234 Pac. (2d) 844, (Utah) reading from page 847, the court states:

"Ione was a party plaintiff. She was properly prohibited from testifying as to conversations with the decedent in conformance with our so-called 'dead man's statute,' section 104-49-2 (3), U.C. A. 1943, Clark vs. Clark, 74 Utah 290, 279 P. 502."

Section 1880, California Code of Civil Procedure, dealing with persons who cannot testify, Section 3, reads as follows:

"3. (Parties, etc., against executors, etc.) Parties or assignors of parties to an action or proceeding, or persons in whose behalf an action or proceeding is prosecuted, against an executor or administrator upon a claim, or demand against the estate of a deceased person, as to any matter or fact occurring before the death of such deceased person."

The California law above quoted is dissimilar to our Utah statute, to be sure, but the California statute makes incompetent as witnesses **parties** to an action or proceeding against an executor or administrator upon a claim or demand against the estate, etc.

At common law no person was permitted to become a witness in an action or proceeding to which he was a party or in which he was interested. 70 C. J., paragraph 260, page 193; 70 C.J., paragraph 261, page 194. The common law disabilities of witnesses have been abrogated in Utah by Section 104-49-1, Utah Code Annotated 1943, (now Section 104-24-1, Chapter 24 of Chapter 58, Session Laws 1951).

The abrogation of said common law disabilities is subject, however, to the exceptions set forth in Section 104-49-2, Utah Code Annotated 1943, one of which exceptions is the Utah "Dead Man Statute" above set forth.

In framing the exceptions provided by said Section 104-49-2, Utah Code Annotated 1943 to the provisions of Section 104-49-1, Utah Code Annotated 1943, (now Section 104-24-1, Session Laws 1951), the Legislature must have intended to use the words "party" and "parties" to an action in the usual and appropriate meaning in law; otherwise, it would not have passed Section 88-2-11, Utah Code Annotated 1943, which reads as follows:

"Words and phrases are to be construed according to the context and the approved usage of the language; but technical words and phrases, and such others as have acquired a peculiar and appropriate meaning in law, or are defined by statute, are to be construed according to such peculiar and appropriate meaning or definition."

Section 104-49-1, Utah Code Annotated 1943, (now Section 104-24-1, Session Laws 1951), is substantially the same as Section 1879, California Code of Civil Procedure, and Section 88-2-11, Utah Code Annotated 1943, is almost word for word with Section 16, California Code of Civil Procedure.

The California courts in construing the meaning of the words "party" and "parties" to an action or proceeding under the "Dead Man Statute" have held that executors and administrators are parties under the law prohibiting parties in actions to testify.

In the case of *Roncelli vs. Fugazi*, 186 Pac. 373 (Cal.), the Court, reading from pages 375 and 376, says:

"While section 1880 of the Code of Civil Procedure has often received the consideration of the appellate courts of this state, the reports do not show it to have been previously involved in an inquiry to determine whether the word 'parties,' as therein used, is broad enough in meaning to apply to a party to the record suing only in his representative capacity. This question is purely one of interpretation. We can neither abridge nor extend the scope of the terms of the section, nor should we concern ourselves with the philosophy of the rule established by the section, or speculate as to the motives which impelled the Legislature to enact it, except it be in aid of the discovery of the real meaning of its items. The very words of the statute must control. *Moore vs. Schofield*, 96 Cal. 486, 31 Pac. 532. Its inhibitions have been held to apply to the testimony of a person who is merely a nominal party to an action. As stated in *Blood vs. Fairbanks*, 50 Cal. 420:

' - - - The statute does not merely exclude parties who have or are supposed to have an interest adverse to the estate of the decedent, but, by its terms renders all the nominal parties to the action incompetent.'

"In framing the exceptions provided by section 1880 to the general enabling act (section 1879, Code Civ. Proc.), the Legislature must have intended to use the word 'parties' in its usual and appropriate meaning in law (section 16, Code Civ.

Proc.). If it had been intended to render the testimony of a party to the record, suing in his representative capacity, admissible under the circumstances stated in the statute, it would have been a very simple matter to have so declared in the statute itself, as was done in the Washington statute, where it is provided that the exclusion of the testimony of a party to the record 'shall not apply to parties of record who sue or defend in a representative or fiduciary capacity and who have no further interest in the action.' Since our statute of exclusion uses the word 'parties' in its broad generic sense, we do not deem it proper to restrict its meaning to smaller compass, thus confining its application to parties to the record suing in their individual capacities.

"Under an Ohio statute providing that 'a party shall not testify where the adverse party is - - - an executor of a deceased person,' etc. (Rev. St. § 5242), the Supreme Court of that state held that the inhibition of the statute applied to an executor prosecuting an action in his representative capacity against the defendant as executrix. *Farley v. Lisey*, 55 Ohio St. 627, 45 N. E. 1103. In that case the court said:

"True, the plaintiff was prosecuting the action in his representative character as executor of the lessor; but the issues in the action were joined between him as such and the defendant; and he was interested in maintaining the issues in his behalf, not only in his representative capacity, but individually also to the extent, at least, that his compensation was affected by the amount recovered in the action. The statute has reference to the adverse character which the parties sustain toward each other as parties in the action at the time of the trial, and not necessarily to their relation as parties to the transaction which is the subject of the action or defense; and, unless these parties were adverse, there were none in the action, for they were the only parties. It is said the plaintiff



might have resigned as executor, and then he would have been competent to testify as desired; but then he would no longer be a party to the action, and therefore not within the inhibition of the statute. But, being a party to the action when his testimony was offered, it was properly excluded.' ”

The Iowa Court, in considering the question at issue in this case, in the case of *In Re Conner's Estate*, 36 N.W. (2d) 833, reviews the Iowa cases on this point and at pages 839 and 840 says:

“ - - - Over objections by appellants that he was an incompetent witness under the dead man statute, section 622.4, the court permitted Mr. Updegraff, executor of Zanette's estate, to repeat communications between the witness and Zanette in which she detailed the story of Ellis' lineage. Error is predicated upon these rulings. We conclude this assignment of error is well founded.

“Mr. Updegraff was a party to the action within the purview of the dead man statute. *Williams v. Barrett*, 52 Iowa 637, 641, 3 N. W. 690, 693, states:

‘Counsel for appellant contend that the witness was competent because he had no interest whatever in the question (concerning which he testified). - - - This may be conceded, but the language (of the statute) - - - is plain and explicit that ‘no party to any action or proceeding - - - shall be examined as a witness - - - against the executor of heir at law - - - of such deceased persons., - - - John T. Clark was a party to the action, and for that reason was disqualified as a witness to testify to personal transactions between himself and the deceased. We think the fact that the other defendants were not necessarily jointly liable with him, and that separate actions might have been maintained against the defendant,



makes no difference. There was but one action on trial, and the witness, being a proper party defendant therein, was by the very terms of the statute incompetent to testify to the facts under consideration.'

"Bohle v. Brooks et al., 225 Iowa 980, 983, 282 N. W. 351, 353, states:

' - - - Even though the interest of Mr. Brooks is only nominal, yet he is a party to the action, and in conformity with the statute and our former pronouncements, as such party he is incompetent to testify as to the personal transactions with the decedent.'

"Burton v. Baldwin, 61 Iowa 283, 285, 16 N.W. 110, 111, held incompetent the testimony of Sophronia Baldwin who was made a party to a partition proceeding for the purpose of ascertaining and assigning her dower, and stated:

' - - - She is a party to the action; her testimony relates to a personal communication between herself and a person now deceased, and is given against the heir at law of such deceased person. It is true, she has no interest in common with the other defendants against the plaintiff, but such adverse interest does not seem to be necessary in order to the exclusion of the testimony.'

"In the language of Clinton Savings Bank v. Underhill, 115 Iowa 292, 294, 88 N.W. 357, 358:

' - - - A mere nominal party, or one who has no substantial interest in the action, is disqualified under this section.'

"To the same effect is Nugent v. Dittel, 213 Iowa 671, 239 N. W. 559.

"In Fry v. Gullion, 143 Iowa 719, 724, 121 N.W. 563, 565, 21 Ann. Cas. 285, parties to parti-

tion proceedings filed a disclaimer. The court said this 'may possibly have removed the disqualification of interest but it could not remove the disqualification which still attached to them as parties, unless we are able to say that they were no longer proper parties to the action.'

"James v. Fairall, 168 Iowa 427, 431, 148 N. W. 1029, was an action to set aside a will. A devisee who had been made a party defendant filed a disclaimer and the action was dismissed as to him. The court held the circumstances indicated collusion with plaintiff and the dismissal did not have the effect of making his evidence competent."

"An article by Mason Ladd in 19 Iowa Law Review 521, 526, discusses the decisions and states:

"The statute excludes parties because they are parties and as distinguished from persons interested in the litigation. - - - The cases in the above situations have applied literally the statute which is apparently based on the theory that even nominal parties would be sufficiently concerned in the interests which they merely represent to be unsafe as witnesses.'

"In considering his competency under the dead man statute Updegraff as a witness may not be separated from Updegraff, executor. This court held in Schmid v. Kreisner, 31 Iowa 479, that while generally an administrator is a competent witness for the estate, he is not competent in a case where the adverse party is also an administrator."

Counsel for the plaintiff cites and relies upon the case of *In Re Van Alstine*, 26 Utah 193; 72 Pac. 942. The case of *In Re Van Alstine* does not support counsel's position for two reasons:

(1) Because the Van Alstine case is a case involving a will contest and the Utah Case of *Miller vs. Livingston*, 31 Utah 415; 88 Pac. 338, holds that a will contest is not within the statute and the guardian ad litem contesting the will is not within the class excluded. It is settled in this state by the *Livingston* case that a will contest is not within the statute. The case of *Miller vs. Livingston* was an action by the daughter against the administratrix of her father's estate to have the will revoked because of undue influence of the decedent's second wife, not the contestant's mother. The plaintiff called other daughters to testify as to conversations with and the conduct of the testator and they were not permitted to testify. The court held this to be error. The court in the case of *Miller vs. Livingston*, 88 Pac. 338, reading from pages 344 and 345, states:

"The statute in this regard is intended to protect the estates of deceased persons from assaults, 'and relates to proceedings wherein the decision sought by the party so testifying would tend to reduce or impair the estate, and does not relate to the relative rights of the heirs or devisees as to the distribution of an estate in a proceeding by which the estate itself is in no event to be reduced or impaired.' (Citing cases). These authorities, and other which can be cited, hold that the controversy such as here is between living parties, who, on the one side, are the devisees or legatees under the will, and on the other, the heirs at law of the testator. The former claim to take the estate under the will, the latter, under the statute regulating the descent of estates, insisting that the alleged will is a nullity. The act of the testator in making the alleged will is the only subject-matter of the investigation. The estate of the testator is not interested. The interests of those claiming to succeed to it either by operation of law or by operation of the will are

alone involved. The estate remains intact and undiminished whatever may be the result of the controversy, and the subject-matter of the investigation is not a transaction with nor a statement by the decedent. As to such an investigation, the parties to the suit and those interested in the result thereof are upon terms of equality in regard to the opportunity of giving testimony. Our conclusion, therefore, is that all the parties interested are competent to testify to any fact which is relevant and material to the issues involved, and that the court erred in excluding the proffered testimony." and,

(2) Because at the trial in the Van Alstine case when Dora S. Van Alstine, the guardian ad litem, was called as a witness for the minors, the only objection made to her competency as a witness was, reading from page 943:

"on the ground that under the provisions of Section 3348 of the Revised Statutes, if judgment should be rendered against the contestants of the will - - - cost might be assessed against her and she, therefore, had a direct interest in the event of the suit and was disqualified as a witness under Sub-division 3, paragraph 3413, Rev. St. 1898."

The objection was based entirely on the interest of the witness and not upon the fact that the witness was a party to the action, and the question of whether a party to an action is disqualified as a witness was never presented to nor decided by the court.

Counsel cites the case of Grieve vs. Howard, 54 Utah 225; 180 Pac. 423, as holding that, "Mack Howard, a defendant, was held to be qualified to testify because of the fact that he had no interest, a merely nominal defendant." We do not understand the Grieve case to hold as counsel states.

In the Grieve case a special administrator brought an action to set aside for undue influence in procuring it, a deed executed by the deceased to the defendant. The defendant sought to rule out testimony of the administrator as to transactions equally within his knowledge and that of the deceased. This was an attempt to close the mouth of one who endeavored to protect or increase the estate. The grantee attempted to use the rule in reverse. The statute was not applicable to make incompetent such witness.

Judge Thurman in the Grieve vs. Howard case, 180 Pac. 423, reading from page 429, says:

“ - - - A reasonably careful analysis of this statute will conclusively demonstrate that, in view of the relation and character of the parties, the matter was not within the statute. As we understand the situation, defendant was defending not as an heir of the deceased, but as a grantee under the deed executed by her. The relation was not such as to entitle him to object to the testimony on the grounds that it was prohibited by the statute. *Miller v. Livingstone*, 31 Utah at page 435, 88 Pac. 338; 40 Cyc. 2270 to 2275, inclusive.”

The last Utah case cited by counsel in his brief is the case of *Staats vs. Staats*, 63 Utah 470; 226 Pac. 677. In this case the testator's son, who was also the surviving partner, sued his mother and intervening brothers. The court in permitting the plaintiff and other heirs to testify concerning transactions with the deceased, reading from 226 Pac. at page 680 says:

“In view, therefore, that she is here claiming in her own right the other heirs are competent witnesses. - - - That the statute has no application where the controversy arises between or

among the heirs and merely involves questions relating to their respective rights as such and where there is no assault upon the estate.”

Judge Wolfe, in commenting upon the case of *Staats vs. Staats*, in *Maxfield vs. Sainsbury*, 172 Pac. (2d) 122 (Utah), and reading from page 131 states, that the *Staats* case is somewhat puzzling and concludes that the *Staats* case,

“appears to be technically wrong so far as correctly applying Section 104-49-2 (3), Utah Code Annotated 1943, is concerned.”

This Court in the case of *Wood vs. Fox*, 8 Utah 380, 32 Pac. 48, has held that an action to establish a resulting trust against the estate of a deceased person was a claim or demand against such estate. This case was carried to the Supreme Court of the United States and is reported in 17 Sup. Ct. 713, 41 L. Ed. 1145. The Supreme Court of the United States said, speaking through Justice Harlan:

“We cannot doubt that the claims as asserted in this suit by Whitney are within the meaning of the Utah statute, claims or demands against the estate of a deceased person. - - - The Supreme court of Utah properly rejected the suggestion that such claim or demand was not against the estate of Lawrence.”

The court held that the plaintiff was an incompetent witness as to testimony of transactions with the decedent.

We have copied from and we are grateful for the very scholarly discussions of the so-called “Dead Man Statute” in the article written by Mr. Justice Wolfe in 13 Rocky



Mountain Law Review, 282, (June, 1941) which also appeared in the Utah Bar Journal, Volume 11, July-August, 1941, Nos. 7 and 8. It has been of considerable assistance to us.

Plaintiff cites 58 Am. Jur., Section 282, which reads 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.”

To support the position that plaintiff is a competent witness and after citing the above section, counsel for plaintiff abruptly concludes in his brief at page 23 as follows:

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

This is, however, not our statute. Our Dead Man Statute clearly makes incompetent (1) a party to any civil action, suit or proceeding, and it also makes incompetent (2) any person directly interested in the event thereof, and also makes incompetent (3) any person from, through or under whom such party or interested person derives his interest or title or any part thereof.



Under the plain reading of the Utah Dead Man Statute one does not have to have any direct interest in the result of the suit to be incompetent as a witness. It is sufficient to make one incompetent as a witness if one is a party to any civil action, suit or proceeding.

A careful reading of Section 282, above cited by the plaintiff, seems to be against plaintiff's position rather than for her. The last portion of the quoted section refers to **"parties to the issue."** Our Dead Man Statute says "a party to any civil action, suit or proceeding." We do not think the cited section applicable under our Dead Man Statute.

Plaintiff cites the Minnesota case of *Exsted vs. Exsted*, 202 Minn. 521, 279 N.W. 554, 117 A.L.R. 599. This case is not in point and does not sustain plaintiff's contention. The Minnesota Dead Man statute states: "It shall not be competent for any party to an action - - - to give evidence therein of or concerning any controversy - - - **relative to any matter at issue between the parties.**" 2 Masson's Minn. St. 1927, paragraph 9817 (MSA, paragraph 594.04). It has been held that the term "party to an action," under the above statute, **means a party to the issue to which the testimony relates, and not merely a party to the record,** *Bowers vs. Schuler*, 54 Minn. 99, 55 N.W. 817, and that an executor or administrator while a necessary party to the record is not a party to the issue, *Exsted vs. Exsted*, above cited. The *Exsted* case is, therefore, not in point under the

Utah Dead Man Statute. The two statutes are entirely different.

The case of Doty vs. Doty, 118 Kentucky 204, 80 S. W. 803, 2 L. R. A. (NS) 713, cited by plaintiff is not in point. The Kentucky dead man statute is entirely different and is in no way even similar to the Utah Dead Man Statute. The Kentucky statute provides, "No person shall testify for himself." Our statute says, "A party to any civil action, suit or proceeding," is incompetent as a witness. The Kentucky case is not in point under the Utah dead man statute. The two statutes are entirely different.

Lillian Jackson was therefore, an incompetent witness under the plain mandate of the Utah Dead Man Statute which declares that, "A party to any civil action, suit or proceeding," is incompetent as a witness.

We believe that from what we have said above it is conclusive that Lillian Jackson is an incompetent witness. However, we desire to call the Court's attention to the interest of the plaintiff in the result of this action and the peculiar manner in which this interest shows up. Plaintiff, in paragraph 4 of her Complaint, alleges, "That said decedent in his lifetime became indebted to **this plaintiff** and to her sons and daughters in the sum of \$24,500.00, such indebtedness to be paid upon the death of the decedent." (R. Page 1). Paragraph 5 of the Complaint says in part, "That on or about August 10, 1950, the plaintiff duly filed her claim against the said Sinda Jackson as Executrix of said estate for the sum of \$24,500." (R. page 1 and 2). Said claim filed by the plaintiff against the Executrix of said estate of John Jackson, deceased, says in part, "thus leaving

due to **this claimant and her children**, the real parties in interest," (R. Page 6) and again in said claim plaintiff says, "That the amount of the foregoing claim, to-wit: Twenty-four Thousand Five Hundred Dollars (\$24,500.00) is **justly due to said claimant and her children.**" (R. Page 6).

Said claim, upon which this action is based, was filed September 1, 1950, by Lillian Jackson for the benefit of herself and her children, namely, Belle Dennis, Jeanne Raab, **Fanny Jackson, a deceased daughter**, Joyce McKee Jesse Jackson, John Jackson, Jr., and Glenn Jackson.

Strange things went on in regard to the claims filed against the Estate of John Jackson, deceased. Lillian Jackson, the plaintiff, filed her claim upon which this action is brought on September 1, 1950, for and on behalf of herself and her seven children, as aforesaid, one of whom, Fanny Jackson, was dead. On October 16, 1950, Belle Dennis, Jeanne Raab, Joyce McKee, Jesse Jackson and Glenn Jackson, and on November 30, 1950, John Jackson, they being all of the living children of the plaintiff and the deceased, John Jackson, each filed separate identical claims against the Estate of John Jackson, deceased. A copy of said identical claims so filed by each of said children reads, except as to title of Court and cause and acknowledgement, as follows:

"By reason of a marriage settlement made between John Jackson deceased, and Lillian Jackson, former wife of John Jackson and the mother of this claimant, wherein and whereby the said John Jackson agreed with Lillian Jackson, as a part of said marriage settlement, that he would provide by will that claimant would receive the sum of ..... \$3,500.00

upon the death of the said John Jackson; which said will was duly executed on the 7th day of September, 1920, and duly filed with the clerk of the District Court of Grand County, State of Utah, a copy of said will being hereto attached and made a part of this claim.

“That there were seven sons and daughters of the said John Jackson and my mother Lillian Jackson, and it was provided in said will that each thereof should receive the sum of \$3500; that since the execution of said will one of the daughters has died, leaving one-sixth of her share of said bequest provided for in said will to this claimant—\$ 583.33

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\$4,083.33

“Said gift and bequest in said will were made at the express request of my mother, Lillian Jackson, for our mutual benefit, and in lieu of any provisions for the support, education, comfort and maintenance of the children of said John Jackson and Lillian Jackson.”

That each and all of said claims, except the claim of John Jackson, were rejected on October 16, 1950, and notice of rejection was duly served and filed October 16, 1950, with the Clerk of the Court; that the claim of John Jackson was rejected on the 30th day of November, 1950; that notice of rejection of said claim was duly served and filed November 30, 1950, with the Clerk of the Court; that the time for presenting claims against the Estate of John Jackson, deceased, expired on the 10th day of October, A. D. 1950; Decree establishing due and legal notice to creditors in the Estate of John Jackson, deceased, was duly made and entered by the Court on the 26th day of January, 1951. Each and all of said claims were rejected by the Executrix of the Estate of John Jackson, deceased;

notice of rejection of each of said claims was duly served and filed with the Clerk of the Court; more than three months have expired since the serving and filing of each of such notices of Rejection; no suit has ever been filed in any Court whatsoever against the Executrix of the Estate of John Jackson, deceased, by any of said living children on any of said claims so presented, rejected and filed.

The only suit ever filed to enforce any claim against the Estate of John Jackson, deceased, is the Complaint filed in this action by Lillian Jackson, as plaintiff, against Sinda Jackson, Executrix of the Estate of John Jackson, deceased, based on the claim presented and filed by the plaintiff, Lillian Jackson, on September 1, 1950, as aforesaid. Each and all of the living children of Lillian Jackson, the plaintiff, and the deceased, John Jackson, has abandoned his claim filed against said estate as aforesaid. In any event, none of the living children has ever at any time filed any suit to recover on any of the claims so filed and rejected as aforesaid, and each and all of said claims are barred by the provisions of Section 102-9-4, Utah Code Annotated 1943, and Section 102-9-9, Utah Code Annotated 1943. We pleaded these matters as a defense to this action (our answer) to complaint as amended. (R. Page 48 to 54).

Yet, this plaintiff shows her interest by prosecuting this action and has gone to the extent of taking an appeal to this Court.

There is another interesting matter in connection with this case. Fanny Jackson, one of the children for whose benefit plaintiff claims she brings this lawsuit, is



dead. She died long before any claim was ever presented by the plaintiff and long before this law-suit was ever started. No legal representative of the Estate of Fanny Jackson, deceased, has ever been appointed and no legal representative of the Estate of Fanny Jackson, deceased, has ever presented a claim against the Estate of John Jackson, deceased, and yet, Lillian Jackson, the plaintiff in this action, presumes to file such a claim against the Estate of John Jackson, deceased, for and on behalf of said Fanny Jackson, deceased, and then presumes to file suit for and on her behalf without ever being appointed administratrix or executrix of the Estate of Fanny Jackson, deceased. The plaintiff claims to be the trustee of an express trust for all of her living children and also claims to be the trustee of an express trust for her deceased daughter upon the curious theory set forth in paragraph 8 of plaintiff's Complaint, which reads as follows:

"8. That the aforesaid agreement with reference to the making of a will by the said John Jackson and providing that their children should be beneficiaries thereof was made with this plaintiff in trust, to be administered by her in behalf of the following named sons and daughters, the issue of the marriage between this plaintiff and John Jackson, namely:

**Age at time of  
making will**

Belle Dennis, formerly Belle Jackson	24 years
Jeanne Raab, formerly Aldiva Jackson	11 years
Fanny Jackson	16 years



Joyce McKee, formerly	
Josephine Jackson	6 years
Jesse Jackson	22 years
John Jackson, Jr.	18 years
Glenn Jackson	8 years

“That subsequent to the making of said will, one of the above named children, Fanny Jackson, a daughter, died and that the heirs of the said deceased consist of the said above named living children and that by reason thereof this plaintiff is entitled to recover the interest of said deceased child subject to the probate of this court, for the benefit of the living children of this plaintiff and said John Jackson, deceased, and this action is prosecuted in behalf of the heirs of said estate as shown by the aforesaid will, Exhibit 3.” (R. page 4).

Lillian Jackson, the plaintiff, is the mother of Fanny Jackson, deceased, and as such she is one of her heirs at law, if not the sole heir at law of said Fanny Jackson, deceased. As such heir at law, the plaintiff is directly interested in any recovery made in this action against the Estate of John Jackson, deceased.

We, therefore, conclude that Lillian Jackson, the plaintiff, is an incompetent witness for two reasons under the Utah Dead Man Statute:

1. Because she is a party to the action, and
2. Because she is a person directly interested in the event thereof.

Objections (2) and (3) to the testimony of Lillian Jackson, above set forth, will be argued together as the same law and reasoning applies to both. This is an action to enforce an alleged oral contract claimed to have been made on the 22nd day of April 1918, at Orland, Glenn County, State of California, between the plaintiff and John Jackson. Plaintiff claims that under said alleged oral contract, John Jackson agreed to make a will and bequeath to his seven children the sum of \$3,500.00 each.

The California Courts have construed Section 1973, California Code of Civil Procedure and Section 1624, Civil Code of California many times. In the case of Bogan vs. Wiley, decided January 14, 1946, 164 Pac. (2d) 912, at page 914, the Court says:

“There is no merit in the appeal and hence the judgment must be affirmed upon the rules of law so well settled that a brief reference to the decisions will suffice.

“(1) The code sections declare that an oral contract to devise or bequeath property by will is invalid. Since their enactment our decisions have consistently held that such contracts are unenforceable, Hagan v. McNary, 170 Cal. 141, 144, 148 P. 937, L.R.A. 1915E, 562; Trout v. Ogilvie, 41 Cal. App. 167, 173, 182, P. 333; De Mattos v. McGovern 25 Cal. App. 2d 429, 432, 77 P. 2d 522; Zaring v. Brown, 41 Cal. App. 2d 227, 231, 106 P. 2d 224; Smith v. Bliss, 44 Cal. App. 2d 171, 175, 112 P. 2d 30; Long v. Rumsey, 12 Cal. 2d 334, 341, 84 P. 2d 146; Rotea v. Izuel, 14 Cal. 2d 605, 607, 95 P. 2d 927, 125 A.L.R. 1424.”

The Supreme Court of California in the case of *Giles vs. Reed*, 186 Pac. 614, reading from page 615, states:

“The chief error urged by appellant is predicted upon the ruling of the court in sustaining defendant’s objections to questions whereby it was sought to elicit testimony tending to prove that deceased in her lifetime orally agreed with plaintiff, for the consideration named, to make a will devising to her the real estate described in the complaint. That the alleged contract was invalid, by reason of there being no note or memorandum in writing and subscribed by deceased admits of no question (Subdivision 7 § 1624, Civil Code); hence there was no error in the ruling.”

In the case of *Stevenson vs. Pantaleone*, 21 Pac. (2d) 703 (Cal) one of the objections upon which the offered testimony was excluded was based upon Section 1624 of the Civil Code and the objection was also predicated on Section 1973 of the Code of Civil Procedure above mentioned. The above court reading from page 706 says:

“The ruling of the court sustaining the objections to the offered evidence was correct, because the agreement was not in writing.”

The above cases and the many other cases cited in our brief seem to us to be conclusive that the testimony of Lillian Jackson was also barred by the two sections of the California Code above mentioned, and that the objections made to said testimony as set forth in (2) and (3) above are well taken, and should be sustained.

(4) The testimony offered by Lillian Jackson was an attempt to alter, vary, contradict, change and add to the terms of a written instrument. The objection to her testimony should also be sustained on this ground.

The plaintiff brings this action to recover for the breach of an alleged oral contract to make a will entered into by the plaintiff with John Jackson, now deceased, on the 22nd day of April, 1918. Plaintiff claims that prior to, contemporaneously with and at the same time that the written agreement of April 22, 1918, was entered into, decedent orally agreed that he would make a will in which he would bequeath to each of his children, the issue of the marriage of the plaintiff and said decedent, the sum of \$3500.00. Nothing is said in the written agreement, however, about this alleged oral agreement on the part of the decedent to make said will leaving to the children the sum of \$3500.00 each. The testimony offered by the plaintiff as a witness to prove this oral contract is in direct conflict with the written agreement entered into between the plaintiff and her ex-husband, the decedent. The written agreement is fully set forth in the Findings of Fact (R. Page 124 to 130). The plaintiff pleaded this very agreement and expressly made this written agreement a part of her complaint. (R. Page 2). The defendant admitted the making and entering into of said written agreement.

There is no ambiguity whatsoever in this written agreement. It is clear, concise, specific and needs no explanation. It sets forth the entire agreement. There is no fraud or mistake alleged, and none proved. Plaintiff in said written agreement agreed with the decedent that she would bring up and support the children for the consideration of a property settlement of the approximate value of \$28,689.00, which sum she received in full in 1918. Now, approximately 32 years after the making and entering into

of said written agreement, solemnly made and sworn to by the plaintiff, and after the death of the decedent, she comes into this Court and tries to tell this Court that at the time of the making and entering into of said written agreement it was also orally agreed that Mr. Jackson agreed with her in consideration of her taking care of the children which she had already agreed to do, that he would make a will and bequeath to the children the sum of \$3500 each. This is in direct contradiction to the explicit terms and provisions of the written agreement of April 22, 1918, and is an attempt to alter, vary, contradict, change and add to the terms of said written agreement.

Parol evidence is not admissible to contradict, vary, add to or subtract from the terms of a written instrument and the evidence in this case does not come within any of the exceptions to the above mentioned general rule.

The Supreme Court of Utah in the case of Starley et. al. vs. Deseret Foods Corporation et al, 74 Pac. (2d) 1221, reading from page 1224, states:

“Courts have been quite ready to open the case to parol evidence to explain the intention of the maker where there is anything on the face of the note giving rise to ambiguity. This view is well indicated by the cases cited by appellant. But where there is no ambiguity, the rule will not be relaxed. The intention of the parties must be gathered from the instrument itself. Any other rule would tend to destroy the value of written instruments. (Citing cases)”.

The Court at page 1224 also states:

“This court has many times held that in the absence of fraud, mistake, or ambiguity parol evidence is inadmissible to vary or explain the terms of a written instrument. (Citing cases)”

In the case of Combined Metals, Inc., et al. vs. Bastian, et al, 267 Pac. 1020 (Utah), the Court, reading from page 1027, states:

“ - - - When the testimony of such additional oral agreement was offered, Bastian's objections thereto were overruled. We think the court erred in the ruling. The doctrine is familiar that when parties put their negotiations into writing, in such terms as import a legal obligation, and on its face a completed contract, without any uncertainty as to the object or extent of the engagement, it is conclusively presumed that the whole of the engagement of the parties and the extent and manner of their undertaking have been reduced to writing, and that parol evidence is not admissible to vary or contradict the terms of such writing or add or substitute new or different or additional terms. (Citing cases)”

We could cite many more Utah cases, but we feel that the above cases are sufficient on this subject. The objection to plaintiff's testimony should also be sustained on this ground.

(5) That plaintiff's amended Complaint fails to state a claim against the defendant upon which relief can be granted. We have heretofore argued this matter at Page 12 to 15 of our brief and we believe from what we have there said, that this objection is also well taken.

We believe that from what we have said, and the authorities in support thereof, that we have successfully answered all of the arguments raised by plaintiff in her brief and designated as plaintiff's Point 1, (a), (b), (c) and (d).



### POINT III

## THE COURT DID NOT ERR IN EXCLUDING THE EVIDENCE OF:

### (B). THE TESTIMONY OF KNOX PATTERSON.

At the time of the trial of this action Knox Patterson, who was one of the attorneys for the plaintiff during the trial of the case before the District Judge and who is also attorney for the plaintiff on this appeal, took the stand as a witness to testify for and on behalf of the plaintiff. Mr. Patterson attempted to testify (1) as to conversations which he had with John Jackson and Lillian Jackson in his office at Moab, Utah, on or about the month of June, 1917, relative to a divorce action which he was filing for and on behalf of Lillian Jackson and a proposed property settlement between these two people and (2) as to a conversation had in 1920 with John Jackson at Patterson's law office at Moab, Utah, at which time John Jackson had Knox Patterson prepare his will dated September 7, 1920, (Pl. Ex. I) and at which time it is claimed he (Jackson) told Patterson that he was preparing said will pursuant to an alleged oral promise he had made to Lillian Jackson at Orland, California, to the effect that he (Jackson) would will each of the seven children of John and Lillian Jackson the sum of \$3,500.00 if Lillian Jackson would execute the said written agreement of April 22, 1918. Defendant objected to the testimony of Mr. Patterson upon the following grounds:

(1) That it was heresay, immaterial, irrelevant and incompetent. (R. Page 176).

(2) That under the provisions of Section 1973, California Code of Civil Procedure, an agreement which by its terms is not to be performed during the lifetime of the promisor, or an agreement to devise or bequeath any property or to make any provision for any person by will is invalid and unenforceable unless the same or some note or memorandum thereof be in writing and subscribed by the party to be charged or by his agent and evidence therefore of the agreement can not be received without the writing or secondary evidence of its contents. (R. pages 180 and 183).

(3) That under the provisions of Section 1624, Civil Code of California, an agreement which by its terms is not to be performed during the lifetime of the promisor, or an agreement to devise or bequeath any property or to make any provision for any person by will is invalid and unenforceable unless the same or some note or memorandum thereof is in writing and subscribed by the party to be charged or his agent. (R. pages 180 and 183).

(4) That the testimony of Knox Patterson is an attempt to alter, vary, contradict and change the contents of a written instrument, to wit: the will dated September 7, 1920 (Pl. Ex. I), also found in the Findings of the Court, (R. Pages, 138-140). Our objection is found at R. page 183.

(5) That Knox Patterson is an incompetent witness under the provisions of Section 104-49-3 (2) Utah Code Annotated 1943, now being Section 104-24-8 (2) of the Judicial Code, Laws of Utah, 1951. (R. pages 180-183).

Plaintiff in her brief at pages 28 to 32 inclusive, discusses the question as to whether or not Knox Patterson may testify in this action but she disregards entirely all of the objections made to the testimony of Knox Patterson except one, which is objection marked (5) above.

In substance, the same objections made to the testimony of Knox Patterson were made to the testimony of Lillian Jackson during the trial. We have devoted considerable space in this brief to the proposition that Lillian Jackson cannot testify for the reason that her testimony would alter, vary, contradict and change the said written instrument of April 22, 1918, entered into between Lillian and John Jackson, and for the same reason the testimony of Knox Patterson cannot be admitted to vary, contradict, add to or change the plain terms of the will of September 7, 1920, and would circumvent the provisions of Section 1973, California Code of Civil Procedure and Section 1624 of Civil Code of California, which are the identical objections made to the testimony of Knox Patterson as set forth in paragraphs (2), (3) and (4) above. As the same rules apply to the objections made to the admission of the testimony of Knox Patterson as do to the admissions of the testimony of Lillian Jackson, we shall not cite authorities here in support of our position that the testimony of Knox Patterson was properly objected to on the grounds as stated in paragraphs (2), (3) and (4) above, but we do refer this court to that portion of our brief at pages 39 to 43 which covers this subject as it relates to the testimony of Lillian Jackson and which is likewise controlling as to the objections raised to the testimony of Knox Patterson.

Section 104-49-3 (2), Utah Code Annotated, 1943, now Section 104-24-8 (2) of our Judicial Code, Laws of Utah, 1951, reads in part as follows:

**“Privileged Communications.**

“There are particular relations in which it is the policy of the law to encourage confidence and to preserve it inviolate. Therefore, a person can not be examined as a witness in the following cases:

“(2) An attorney can not, without the consent of his client, be examined as to any communication made by the client to him, or his advice given therein, in the course of professional employment; nor can an attorney’s secretary, stenographer or clerk be examined, without the consent of his employer, concerning any fact, the knowledge of which has been acquired in such capacity.”

Plaintiff did not at the trial nor does she in her brief contend that Mr. Patterson was not the attorney for John Jackson at the time he drew the will of September 7, 1920, (Pl. Ex. I.) and at which time the said conversations between Knox Patterson and John Jackson took place.

In connection with Mr. Patterson’s employment as an attorney for John Jackson, we quote from his testimony given at the trial of this case:

“Q. Were you acquainted with John Jackson, during his lifetime?

“A Yes.

“Q Did you do legal services for him?

“A Yes, time and again.

“Q Did you also do legal services for Lillian Jackson?

“A Yes, she and her husband together.

“Q Over how many years?

“A It would run from 1909 until 1925, I would say so far as John is concerned.

“Q And were you on a retainer basis during that time?

“A No, never.

“The Court. Did you draw the will for him at that time?

“A Yes, sir.

“The Court. Did he pay you for that service?

“A I don’t know, I can’t remember about that but he did not pay me for the divorce, because he thought I hadn’t given him a fair deal and that I had sided in with his wife.

“The Court. You acted for him as his attorney?

“A I acted for his wife, as her attorney, because, he told me that she had said that she wanted Knox Patterson to draw the will.” (R. Pages 174 and 186).

The trial court also found in its Findings of Fact and Conclusions of Law the following:

“That from 1909 to 1925, Knox Patterson represented the plaintiff and decedent, John Jackson, as an attorney at law at various times with no retainer fee from either at any time; that on September 7, 1920, John Jackson went to the law offices of Patterson and Constantine in Moab, Utah, and had them draft the will dated September 7, 1920, and which is set forth in full above, which will be duly executed; that Patterson and

Constantine mailed a copy of said will to Belle Dennis, the oldest daughter of John Jackson, who was named in said will as executrix thereof and in said letter of transmittal, Patterson and Constantine stated that they had prepared it for her father, John Jackson, and were mailing it to her at his request. John Jackson sealed the original will in an envelope and filed it with the County Clerk of Grand county, Utah, and said envelope contains the written and printed material set forth above in these Findings." (R. pages 148 and 149). (For letter of transmittal of will see (Plaintiff's Ex. H).

There can be no question from the testimony given by Mr. Patterson at the trial, the letter Ex. H, and the finding of the Court, above quoted, that an attorney-client relationship was established between John Jackson and Knox Patterson at the time Mr. Patterson drew the will for John Jackson on September 7, 1920.

The case of State vs. Snowden, 23 Utah 318, 65 P. 479 (1901), was one in which the defendant was tried for the crime of adultery and in the course of the trial, objection was made to statements made by the defendant to his attorney about the alleged crime on the grounds that they were privileged under the Utah statute and that the attorney therefore could not testify. Our Court, in discussing this question and also the question of whether an attorney-client relationship had been established between the defendant and the attorney sought to be questioned, said:

" \* \* 'Whatever facts, therefore, are communicated by client to counsel solely on account of that relation, such counsel are not at liberty, even if they wish, to disclose; and the law holds their testimony incompetent.' In the late case



of *Bruley v. Garvin* (Wis.) 81 N.W. 1038, it is held not to be 'absolutely essential that a fee should be paid, or that there should be an actual retainer,' and that it is sufficient if the attorney's legal advice was sought for and he could be considered for the time being the legal adviser of the other. Supporting the same rule is *Jones, Ev.* § 767, and cases cited. The protection of the statute applies to conversations with the attorney in negotiating to employ him. It may be necessary to disclose to the attorney many confidential matters connected with the case before it is determined whether a retainer will be given or accepted. Of course, a different rule would apply to communications made to the attorney after he had informed the person that no employment would or could be accepted. *Nelson v. Becker* (Neb.) 48 N.W. 962, cited with approval in *Farley v. Peebles* (Neb.) 70 N.W. 231. In *Bacon v. Frisbie*, 80 N.Y. 394, 36 Am. Rep. 627, the attorney divided his attentions between the bar of justice and the bar of Bacchus. While presiding at the latter place, a former client, in the presence of several others, but perhaps not in their hearing, submitted a hypothetical proposition to the attorney at the bar. No fee was paid, neither was a suit pending nor contemplated. In a suit afterwards brought between third parties, the court held the saloon conversation privileged, because it appeared from all the facts that it was a confidential communication in the course of professional employment. It is there said: 'All communications made by a client to his counsel for the purpose of professional advice or assistance are privileged, whether they relate to a suit pending or contemplated, or to any other matter proper for such advise or aid,' — citing *Britton v. Lorenz*, 45 N.Y. 51; *Turquand v. Knight*, 2 Mees. & W. 98. See, also, *Williams v. Fitch*, 18 N.Y. 551; *Utica v. Mersereau*, 3 Barb. Ch. 595, 49 Am. Dec. 189; *Green* 1 Ev. (15th Ed.) § 240. The underlying principle of the rule, as stated in the New York case first above cited, is 'that he who seeks

aid or advice from a lawyer ought to be altogether free from the dread that his secrets will be uncovered, to the end that he may speak freely and fully all that is on his mind.' In 19 Ves. 267, Lord Eldon expressed the thought that one way of preventing an attorney who had changed his relations with his client from testifying against his client 'would be by striking him off the roll.' The following quotations in *State v. Dawson* (Mo. Sup.) 1 S.W. 829, from the opinions of Lord Brougham, illustrate the importance and purpose of the rule: 'The foundation of this rule is not on account of any particular importance which the law attributes to the business of the legal professors, or any particular disposition to afford them protection; but it is out of regard to the interests of justice, which cannot be upholden, and to the administration of justice, which cannot go on, without the aid of men skilled in jurisprudence, in the practice of the courts, and in matter affecting rights and obligations which form the subject of all judicial proceedings.' *Greenough v. Gaskell*, 1 Mylne & K. 98. If such communications are not protected, no man would dare consult a professional adviser with a view to his defense or to the enforcement of his rights, and no man could safely come into court either to obtain redress or to defend himself.' *Bolton v. Liverpool Corp.*, 3 Sim. 467.

"It is evident from an inspection of the record that the trial court attached much importance to the question of whether there was an absolute contract of employment. The trial court conceded, in fact, that a conditional employment was proved, and that the appearance for Miss Keeler was upon the employment of the defendant. Undue importance seems to have been attached to the fact that the attorney had not appeared of record for the defendant. Greater weight seems to have been given to the opinion of the attorney that the conversation with him was not in professional confidence than to all the surrounding circumstances showing that such must have been

the case. Upon the entire record, if not alone upon the undisputed facts as testified to by the attorney, it is evident that such relations existed between the attorney and defendant as to make the communication in question privileged. The conclusion upon all the testimony is irresistible that a close confidence existed between the parties, and that the defendant made the statement in confidence to a person whom he regarded, and had reason to regard, as his attorney in the case at bar. In support hereof, also, see *Tramway Co. v. Owens* (Colo. Sup.) 36 Pac. 848; *Davis v. Morgan* (Mont.) 47 Pac. 793; *Moore v. Bray*, 10 Pa. 519; *Benedict v. State* (Ohio Sup.) 11 N.E. 125; *Basye v. State* (Neb.) 63 N.W. 811; *Perry v. State* (Idaho) 38 Pac. 655 (dissenting opinion)."

Defendant in her brief cites *In re Young's Estate*, 33 Utah 382, 94 P. 731 (1908), in support of her argument that the privilege under the statute does not apply to Mr. Patterson. That case, however, is not in point for it involved a will contest and our court, in what is generally recognized as the universal rule, held that the privilege did not extend to will contests as such cases come within the exceptions to the general rule.

Defendant also cites the case of *Anderson vs. Thomas*, 108 Utah 252, 159 P. 2d 142, (1945). That case is not in point. Our Supreme Court in the above case, held as follows:

"We conclude that all of the testimony given by J. S. Christensen, attorney for Mrs. Thomas, was properly admitted either (1) as having been related to communications given in the presence of third parties; (2) as relating to the execution of the deed to which he was an attesting witness; or (3) as not being a communication in the course of professional employment which Mrs. Thomas desired to have confidential."

It is evident from reading the testimony of Mr. Patterson in the case at bar, that none of the three exceptions quoted above from the case of Anderson vs. Thomas, apply in the instant case. Mr. Patterson received the communications upon which he is attempting to testify in the course of professional employment and they were not given in the presence of third parties. It must be admitted that Mr. Patterson was a witness to the will but as this is not a will contest but an action to recover under a contract, the privilege can not be waived.

Defendant also cites Webb vs. Webb, Utah (1949), 209 P. 2d 201. This case is not in point for the reason that the court held that the conversation was admissible under one of the exceptions to the rule whereas in the case at bar, no contention is made that the conversation between Mr. Patterson and his client, John Jackson, came within any of the exceptions to the rule adopted in this state under said Section 104-24-8 (2) of our Judicial Code.

The case of Carey vs. Powell, 32 Wash. 2d 761, 204 P. 2d 193 (1949), is also cited by plaintiff in support of her contention that Knox Patterson should be permitted to testify. A reading of this case discloses that the attorney who drew up the will and contract upon which the action for specific performance was based was, according to his testimony, performing services for the testatrix and her daughter and that the conversation was had in his office in the presence of the testatrix, her daughter and the daughter's husband, and the court held that under such circumstances, the rule of privilege did not apply as to the testimony surrounding the execution of the will and

the contract. In passing, we call to the court's attention that in that case as soon as the case of *In re Torstensen's Estate*, 28 Wash. 2d 837, 184 P. 2d 255, was called to the attention of the attorney, he withdrew from the case because of professional ethics. There has been no withdrawal of the attorney in the case at bar. In the case at bar, no one was present at the time of the alleged conversation between Knox Patterson and his client, John Jackson, other than Mr. Patterson's law partner, George J. Constantine, who was one of the attesting witnesses to the will and so plaintiff can not rely upon the authority of *Carey vs. Powell* as in that case the conversation was had in the presence of two other persons and there was some question as to whether the attorney who drew the will and contract had been employed by the testatrix, whose representatives raised the question of privilege.

As this is an action by Lillian Jackson to recover the sum of \$24,500.00 from the estate of John Jackson, the testimony of Knox Patterson to the effect that John Jackson told him that he had made an oral agreement with Lillian Jackson to will to each of their children the sum of \$3,500.00 or a total of \$24,500.00, would, if permitted to be introduced, defeat the very relationship between attorney and client for which said Section 104-24-8 (2), Judicial Code, was enacted, namely, for the purpose of encouraging confidence and preserving inviolate the relationship between attorney and his client. The statute says "An attorney cannot, without the consent of his client, be examined as to any communication made by the client to him, \* \* in the course of his professional employment; \* \* ." (Emphasis ours). In this case neither the consent of John Jack-



son nor his legal representative was obtained to permit Knox Patterson to testify as to the conversation which he had with John Jackson in September of 1920. And we submit that the evidence at the trial conclusively shows that an attorney-client relationship existed between Patterson and Jackson at the time Patterson was employed to draw the will of John Jackson of September 7, 1920. Plaintiff has failed to show that the testimony of Patterson falls within any of the recognized exceptions to the general rule of privileged communications between client and attorney.

The defendant may contend that the conversation did not take place in the course of professional employment. John Jackson went to Knox Patterson for the express purpose of having his will prepared by Patterson, who had been his attorney since 1909. It is hard to conceive that he went to the office of Patterson and Constantine after his return to Moab in 1920, at the mere suggestion of his former wife, Lillian Jackson, from whom he had been divorced. The fact that Lillian Jackson had said she wanted Knox Patterson to draw up the will did not do away with the relationship of attorney and client created between Jackson and Patterson and thus cause a waiver of the privilege, for if such relationship is done away with by the mere suggestion or recommendation of someone as to the attorney he should consult with, it would lead to the very destruction of the policy of confidence which the law attempts to preserve and encourage between an attorney and his client. There is nothing in the records to show that Lillian Jackson had employed Knox Patterson to represent her at the time the will was prepared, nor does it disclose



that she had any conversation whatsoever with Patterson relative to the preparation of the will in 1920, nor was Lillian Jackson present at the time the will was prepared. The voluntary employment of an attorney is not essential to render confidential communications between attorney and client becoming privileged. *Jayne vs. Bateman*, 191 Okla. 272, 129 P. 2d 188 (1942).

No one was present at the time the alleged conversation took place other than John Jackson and Knox Patterson, and George J. Constantine, Mr. Patterson's law partner, who signed the will as a witness and, of course, the privilege would extend to Mr. Constantine, if he heard the conversation, by virtue of his being a law partner of Mr. Patterson.

"A valid contract of partnership may be made between two or more duly qualified attorneys, but not between an attorney and a person not admitted to practice. A firm of law practitioners, as such, are regarded as a single entity and the general principles of the law of partnership apply to lawyers with the same force that they do to partnerships engaged in other occupations or professions.

"In the absence of a special agreement, each member of the firm assumes the duty of giving to its business all of his time, skill, and ability, as far as reasonably necessary to the success of the common enterprise, and, consequently, in the absence of an express agreement to the contrary any professional services rendered by a member of a firm of lawyers will be presumed to be for the benefit of the firm. \* \* \*

"The acts and admissions of one member of a firm, made in relation to and in the course of the regular business of the firm, are binding on the firm. \* \* \* " 7 C.J.S. Page 838 ¶ 56.

A case which is frequently cited with approval as authority as to what constitutes "professional employment", is *Denver Tramway Co. vs. Owens*, 20 Colo. 107, 36 P. 848 (1894). This case is cited with approval by our Supreme Court in *State vs. Snowden*, *supra*. Justice Elliott, speaking for the Colorado Supreme Court in that case, said:

"To constitute professional employment, it is not essential that the client should have employed the attorney professionally on any previous occasion. Such a limitation of the rule would bear hard upon a person involved in legal controversy for the first time, and also upon an attorney with his first cause. It is not necessary that any retainer should have been paid, promised, or charged for; nor are such matters of any importance except as they may tend to show whether the attorney was or was not professionally employed. Neither is it material that there was a suit pending at the time of the consultation, nor that the attorney consulted did not afterwards undertake the case about which the consultation was had. If a person in respect to his business affairs, or troubles of any kind, consults with an attorney in his professional capacity, with the view to obtaining professional advice or assistance, and the attorney voluntarily permits or acquiesces in such consultation, then the professional employment must be regarded as established, and the communication made by the client, or advice given by the attorney, under such circumstances is privileged. An attorney is employed — that is, he is engaged in his professional capacity as a lawyer or counselor—when he is listening to his client's preliminary statement of his case, or when he is giving advice thereon, just as truly as when he is drawing his client's pleadings, or advocating his client's cause in open court. It is the consultation between attorney and client which is privileged, and which must

ever remain so, even though the attorney, after hearing the preliminary statement, should decline to be retained further in the cause, or the client, after hearing the attorney's advice, should decline to further employ him. The general rule undoubtedly is that a breach of professional relations between attorney and client, whatever may be the cause, does not of itself remove the seal of silence from the lips of the attorney in respect to matters received by him in confidence from his client. *Foster v. Hall*, 12 Pick. 89; *Hunter v. Van Bomhorst*, 1 Md. 504; *Cross v. Riggins*, 50 Mo. 335. In this case, it appears that the conductor, Evans, was present at the conversation between Mr. Mead and the plaintiff. It does not appear whether he heard or participated in such conversation, nor is it material whether he did or did not. The rule excluding the attorney from testifying did not extend to Evans, and there is no reason why he might not have been required to state the conversation, if he heard it. But the fact that Evans might have testified did not make the attorney a competent witness without his client's consent. The statute contains no such exceptions, nor was the consultation held in the presence of opposing parties, or of all parties interested. It does not appear that Evans represented any party in interest, or anybody at all, for that matter. *Rex v. Brewer*, 6 Car. & P. 363."

At page 28 of plaintiff's brief, appears this statement:

"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, \* \* \*".

This is true. Defendant did not object at the trial of this case to the testimony of Mr. Patterson, the attorney who prepared the will and also the attorney who represented the plaintiff at the trial of this case and who also represents plaintiff on this appeal, on the ground of profes-

sional ethics. Defendant left the matter of whether Mr. Patterson should or should not testify in this action on the grounds of professional ethics entirely up to Mr. Patterson. He chose to testify. As to whether it was proper for Mr. Patterson to testify, defendant calls the attention of this court to the discussion of this matter in the case of *In re Tortensen's Estate* 28 Wash. 2d 837, 184 P. 2d 255, at pages 270 and 271 (1947).

It is also well settled that the termination of the relationship of attorney and client does not affect the protection given by the law to communications made in confidence during existence of the relation, the rule being that the privilege, when once attached, continues at least during the lifetime of the client, unless waived by him. 5 A.L.R. 730, *Denver Tramway Co. vs. Owens*, (1894) 20 Colo. 107, 36 P. 848, *Hardy vs. Martin*, (1907) 150 Cal. 341, 89 P. 111.

In the annotation in 64 A.L.R., pages 192 to 194, is found the following:

“\*\*\*And where the attorney who drew the will is requested by the testator to become a subscribing witness thereto, it has been held that there is an express waiver of the privilege within statutory provisions, although the waiver does not permit the attorney to give testimony which would vary the terms of the will. \* \* \* But while a testator waives the seal of confidence by requesting his attorney to witness his will, it seems that he may annul such waiver by revoking the will, so that the attorney will not thereafter be permitted to testify as to its execution and instructions given by the testator respecting the will. \* \* \*”

“ \* \* That, however, no such presumption as to waiver arises so as to permit the attorney to testify to facts which vary the terms of the will

prepared by him, and that in a proceeding to construe the will, the attorney with whom the testator consulted concerning it is not competent to testify concerning a communication made to him by his client touching his estate, the objects of his bounty, or the meaning or effect of provisions contained in the will. *Knepper v. Knepper* (1921) 103 Ohio St. 529, 134 N.E. 476.”

The case at bar does not involve a will contest. Most of the cases cited by plaintiff involve a will contest. The will of September 7, 1920, prepared by the law firm of Patterson and Constantine, was revoked by John Jackson's will of December 9, 1946. The latter will is the will admitted to probate in Grand county, Utah. It therefore seems clear from the above authorities, that even if the case at bar were a will contest case, that Patterson would not be allowed to testify because the waiver of the confidence which Patterson obtained when he was requested to witness the will of September 7, 1920, was annulled by the will of December 9, 1946, because said will revoked the will of September 7, 1920.

The testator's intention is to be ascertained from the words of the will. See Section 101-2-2 Utah Code Annotated, 1943.

There can be no doubt that if Knox Patterson is permitted to testify that it would tend to do injury to the estate of his former client, John Jackson; and the law, as we read and understand it, will not permit an attorney to take advantage of his position to the detriment and injury of a client. John Jackson by his will of December 9, 1946, provided for his wife, Sinda Jackson, and all of his children, both those out of his marriage with Lillian Jackson



and Sinda Jackson. If the last desires of John Jackson can now be set aside through evidence of his former attorney, obtained in the course of professional employment some 32 years ago, what protection then is left to the public dealing with members of the legal profession? How did Knox Patterson obtain the alleged facts upon which he now seeks to testify? Only through his acting for and being employed as the attorney for John Jackson. On this subject the Supreme Court of Kansas in *Sheehan v. Allen*, 67 Kan. 712, 74 P. 245 (1903) in holding that two attorneys were incompetent to testify said:

“In this case, however, it is quite clear the witnesses would not have learned the major portion of the facts which they disclosed, or held the most important conversations which they repeated on the witness stand, had they not undertaken to consult with and act for Richard Collins as his attorneys. This being true, they were incompetent to testify as to such facts and conversations. Without these, they were not qualified to speak upon the question of Richard Collins’ sanity; and, since their observations should have preceded their opinions (*Baughman v. Baughman*, 32 Kan. 538, 4 Pac. 1003), their testimony should have been excluded.”

“The absence of the privilege would convert the attorney habitually and inevitably into a mere informer for the benefit of the opponent.” 8 Wigmore, Evidence, 3d Ed. Sec. 2380a, P. 813. *City and County of San Francisco v. Superior Court*, Cal. (1951), 231 P. 2d 26.

“Truth, like all other good things, may be loved unwisely, may be pursued too keenly, may cost too much; and surely the meanness and the mischief of prying into a man’s confidential consultations with his legal adviser, the general evil of infusing reserve and dissimulation, uneasiness,



suspicion, and fear into those communications which must take place, and which, unless in a condition of perfect security, must take place uselessly or worse, are too great a price to pay for truth itself.' *Pearse v. Pearse*, 1 De G. & Sm. 25." (Cited in *Sitton v. Peyree*, 117 Or. 107, 24 P. 62.)

And so we submit that the trial Judge did not err in sustaining the defendant's objections to the testimony of Knox Patterson.

### POINT III

THE COURT DID NOT ERR IN EXCLUDING THE EVIDENCE OF:

(C.) THERE WERE NO SEPARATE WRITINGS RELATING TO THE SAME SUBJECT WHICH COULD BE CONSTRUED TOGETHER TO BE ADMITTED.

Counsel at page 24 of his brief, argues that separate writings relating to the same subject should be considered together. Plaintiff does not call our attention to any such writings. The only writing signed by John Jackson and relied upon by plaintiff in this case is the will of John Jackson dated September 7, 1920, (Pl. Ex. I), and this writing is not of the class required to take the case out of the Statute of Frauds, as declared by the many authorities hereinafter cited. The case of *Ayoob vs. Ayoob*, 168 P. 2d 462, cited by counsel is not in point in this case because, in the *Ayoob* case, there was a written memorandum of the alleged oral agreement. We desire to cite this court's attention to the case of *In re Edwall's Estate* 75 Wash. 391, 134 P. 1041. This case fully discusses the difference

between agreement and a will, and fully disposes of all of the arguments made by counsel on this subject.

#### POINT IV

#### THE COURT DID NOT MISCONTRUE THE STATUTE OF FRAUDS AND THE CONFLICT OF LAWS.

The alleged oral agreement sought to be enforced in this action was made and entered into April 22, 1918, at Orland, Glenn County, State of California. At the time said oral agreement was made, the parties were residents and citizens of California. Plaintiff is still a resident and citizen of California. Plaintiff seeks to enforce in the State of Utah said oral agreement which is invalid and unenforceable in the State of California. The question of conflict of laws dealing with the California Statute of Frauds is, therefore, one of the questions to be determined. Plaintiff claims that the alleged oral agreement made and entered into in the State of California is not governed by the California Statute of Frauds. We claim the California Statute of Frauds is controlling and conclusive, and that the alleged oral agreement, invalid and unenforceable in California where made, is also invalid and unenforceable in the State of Utah, where said invalid agreement is sought to be enforced.

We pleaded and proved as one of our defenses to the plaintiff's Complaint, Section 1973, California Code of Civil Procedure and Section 1624, Civil Code of California.

Section 1973, California Code of Civil Procedure has been in full force and effect since the year 1907, and reads as follows:

“§1973. AGREEMENTS NOT IN WRITING, WHEN INVALID. In the following cases the agreement is invalid, unless the same or some note or memorandum thereof be in writing, and subscribed by the party charged, or by his agent. Evidence, therefore, of the agreement, can not be received without the writing or secondary evidence of its contents:

“1. An agreement that by its terms is not to be performed within a year from the making thereof;

“2. A special promise to answer for the debt, default, or miscarriage of another, except in the cases provided for in section twenty-seven hundred and ninety-four of the Civil Code;

“3. An agreement made upon consideration of marriage other than a mutual promise to marry;

“4. An agreement for the sale of goods, chattels, or things in action, at a price not less than two hundred dollars, unless the buyer accepts or receives part of such goods and chattels or the evidences, or some of them, of such things in action, or pays at the same time some part of the purchase-money; but when a sale is made at auction, an entry by the auctioneer in his sale-book, at the time of the sale, of the kind of property sold, the terms of the sale, the price, and the names of the purchaser and person on whose account the sale is made, is a sufficient memorandum;

“5. An agreement for the leasing for a longer period than one year, or for the sale of real property, or of an interest therein; and such agreement, if made by an agent of the party sought to be charged, is invalid, unless the authority of the agent is in writing, subscribed by the party sought to be charged;

“6. An agreement authorizing or employing an agent or broker to purchase or sell real

estate for compensation or a commission;

“7. An agreement which by its terms is not to be performed during the lifetime of the promisor, or an agreement to devise or bequeath any property, or to make any provision for any person by will.”

Section 1624, Civil Code of California, has been in full force and effect since the year 1905, and reads as follows:

“§1624. WHAT CONTRACTS MUST BE IN WRITING. The following contracts are invalid, unless the same, or some note or memorandum thereof, is in writing and subscribed by the party to be charged, or by his agent:

“1. An agreement that by its terms is not to be performed within a year from the making thereof;

“2. A special promise to answer for the debt, default, or miscarriage of another, except in the cases provided for in section twenty-seven hundred and ninety-four;

“3. An agreement made upon consideration of marriage other than a mutual promise to marry;

“4. An agreement for the sale of goods, chattels, or things in action, at a price not less than two hundred dollars, unless the buyer accepts or receives part of such goods and chattels or the evidences, or some of them, of such things in action, or pays at the time some part of the purchase money; but when a sale is made at auction, an entry by the auctioneer in his sale book, at the time of the sale, of the kind of property sold, the terms of the sale, the price, and the names of the purchaser and person on whose account the sale is made, is a sufficient memorandum;

"5. An agreement for the leasing for a longer period than one year, or for the sale of real property, or of an interest therein; and such agreement, if made by an agent of the party sought to be charged, is invalid, unless the authority of the agent is in writing, subscribed by the party sought to be charged;

"6. An agreement authorizing or employing an agent or broker to purchase or sell real estate for compensation or a commission;

"7. An agreement which by its terms is not to be performed during the lifetime of the promisor, or an agreement to devise or bequeath any property, or to make any provision for any person by will."

Both of the above sections of the California Code were in full force and effect long prior to the time when the alleged oral agreement above mentioned was entered into at Orland, Glenn County, State of California, on April 22, 1918.

There is a hopeless conflict in the authorities on this question. We believe, however, that the weight of authority and the best reasoned cases support the general rule that the construction and validity of a contract are governed by the law of the place where made, and that this includes the formality or necessity of a written memorandum required by the Statute of Frauds.

II Am. Jur., Conflict of Laws, Section 198, pages 514 and 515, reads in part as follows:

#### "D." STATUTE OF FRAUDS

"§198. Generally.—The authorities are in hopeless conflict as to the extent to which the principle that contracts valid or invalid by their

proper law are valid or invalid elsewhere applies to contracts unenforceable by reason of the statute of frauds of the jurisdiction in which they are made and to be performed. In the application of the general rule that a contract invalid where made is unenforceable in another jurisdiction, though it would have been valid if there made, it has been held that an oral promise or contract, unenforceable in the jurisdiction where made, cannot be enforced in another jurisdiction though it would have been valid if there made. It has also been held that if the contract sought to be enforced was valid where made, it may be enforced in the jurisdiction of the forum though it would have been unenforceable if made in the latter jurisdiction. If the contract is unenforceable both by the statute of the state where it was made, which is proved, and by the statute of the state of the forum, there is no question that it will not be enforced in the latter jurisdiction."

II Am. Jur., Conflict of Laws, Section 200, pages 518 and 519, reads in part as follows:

" - - - - -

" - - - - - The modern trend supports the doctrine that rejects, so far as the conflict of laws is concerned, the distinction based on the procedural or substantive form of the provisions of the statute and regards them for such purpose as essentially substantive, irrespective of their form. Upon the assumption that the statute of frauds or a particular provision thereof relates to substance and not to procedure, the question arises whether the contract is governed in this respect by the law of the place where it was made or by the law of the place of performance, if the two differ. It seems to be held, in a majority of cases, that a contract, valid by the law of the place where it was made, will be enforced, although contrary to the statute of frauds of the place of performance. Conversely to the general rule, it has been held that a contract in violation



of the statute of frauds of the place where it was made will not be enforced, although valid according to the law of the place of performance. - - - ”

In the case of *Lams vs. F. H. Smith Company*, 36 Del. 477; 178 A. 651; 105 A. L. R. 646, reading from page 648, the court states:

“Most of the American decisions discussing the nature and character of the Statute of Frauds, and especially in connection with the conflict of laws, may generally be divided into three groups:

“(1) those that adopt the distinction laid down in *Leroux v. Brown* and hold the Statute remedial or procedural;

“(2) those that repudiate the distinction yet still hold the Statute remedial; and

“(3) those that repudiate the distinction and hold the Statute is substantive.”

The Court then continues and at page 649 of 105 A. L. R. states:

“In the third group holding that the Statute of Frauds should be construed as substantive and not procedural are many well reasoned cases supported by articles by leading educators. *Halloran v. Jacob Schmidt Brewing Co.*, 137 Minn. 141, 162 N. W. 1082, L.R.A. 1917E, 777; *Cochran v. Ward*, 5 Ind. App. 89, 29 N. E. 795, 31 N. E. 581, 51 Am. St. Rep. 229; *Matson v. Bauman*, 139 Minn. 296, 166 N. W. 343; *Miller v. Wilson*, 146 Ill. 523, 34 N. E. 1111, 37 Am. St. Rep. 186; *Goodrich*, Conflict of Laws, §88; Restatement, Conflict of Laws, §334, “Statute of Frauds and the Conflict of Laws,” 32 Yale Law Journal 311. See, also, as to Pennsylvania Act (33PS §1 et seq.) being substantive, *Franklin Sugar Co. v. Martin-Nelly Co.*, 94 W. Va. 504, 119 S. E. 473; *Franklin Sugar Re-*

fining Co. v. Holstein Harvey's Sons (D. C.) 275 F. 622; Franklin Sugar Co. v. William D. Mullen Co. (D. C.) 7 F. (2d) 470."

"The principle that the construction and validity of a contract are governed by the law of the place where it is made applies to the formality or necessity of a written memorandum required by the Statute of Frauds. Lams. v. F. H. Smith Co., 105 A.L.R. 646, 36 Del. 477, 178 A. 651, (Annotated)."

It certainly was not the intent of the California Legislature in passing the above sections of the California Statute that its citizens (and both the plaintiff and the deceased, John Jackson, were at the time the alleged agreement was entered into citizens of the State of California, and the Plaintiff is still a citizen of California) be harassed upon the contract and be faced by oral testimony if sued in the courts of another state. The Delaware Court speaking on this subject in the case of Lams vs. Smith, 105 A.L.R. 646, reading from pages 649 and 650, says:

"The Delaware Statute of Frauds requiring an agreement not to be performed within a year to be evidenced by a memorandum in writing is primarily for the benefit of the citizens of Delaware. It was the agreement or contracts of Delawareans which were mainly sought to be protected from the future uncertainties of oral testimony and the Legislature was not merely laying down a rule of evidence for the Courts. If the necessity of writing be procedural then while the lack of writing would prevent the enforcement of the contract in the Courts of Delaware yet the Delaware citizen would still be liable to be harassed upon the contract and to be faced by oral testimony if sued in the Courts of another State, the Statute of which had been held to be substantive. On the other hand, if the necessity of writing be construed as one of the

formalities of the contract, then the absence of the writing would make the contract—not void—but unenforceable in the Courts of Delaware, and, under principle of comity and conflict of laws, unenforceable outside of the State and insure to the citizens for whose benefit the Act was passed the full measure of protection. Restatement, Conflict of Laws § 334.”

Speaking on this subject, the California Court in the case *O'Brien vs. O'Brien*, 241 Pac. 861 (Cal.), reading from page 864, says:

“It must be taken as the settled law in this state that by the amendment of 1905, adding subdivision 7 to section 1624 of the Civil Code, and by the corresponding provision of subdivision 7 of section 1973 of the Code of Civil Procedure as amended in 1907, ‘an agreement - - - to devise or bequeath any property, or to make any provision for any person by will’ is invalid unless the same or some note or memorandum thereof be in writing and subscribed by the party to be charged or his agent. - - -

“The reason prompting the amendment of 1905 is aptly stated by the Code Commission in his note appended to Section 1624 as follows:

“ ‘The change consists in the addition of subdivision 7. The cases in which it (is) sought to establish by parol evidence alleged agreements to provide for a person by will are becoming so numerous as to warrant the assumption that the reasons inducing the original enactment of the statute of frauds apply with especial force to agreements of this class and that they ought to be brought within that statute.’

“Since that amendment, the effect of the new subdivision as applied to numerous and varying

states of facts has been before the courts, but nowhere has it been decided, so far as we are advised, that the amendment should not be given the same force and effect as other provisions of the statute of frauds. - - - ”

There is an exhaustive annotation of the cases on this point immediately following the recorded case of Lams vs. F. H. Smith Company, 36 Del. 477, 178 A. 651; 105 A. L. R. 646. In analyzing the matters under discussion in this case the annotator in 105 A.L.R., reading from page 661, states:

“In other words, the adoption either of the view that the essential character of the statute as substantive or procedural depends upon its form, or of the view that the statute, regardless of its form, is essentially procedural, leaves always open the possibility that the breath of life may be breathed into a contract that was stillborn tested by the law of the place where it was made, if the defendant is unwary enough to be caught, or to permit his property to be caught, in a jurisdiction whose statute is satisfied (a statute which presumably was entirely beyond the range of reasonable contemplation of the parties at the time of their transaction); and, upon the other hand, leaves open the possibility of practically nullifying a contract valid and enforceable tested by the law of the place where it was made, if the party desiring to escape its burdens takes himself and his property to, and keeps them in, another jurisdiction whose statute is not satisfied. Both of these possibilities are avoided by the adoption of the view that the Statute of Frauds, regardless of its form, is essentially substantive, unless in a particular instance the court regards it as contrary to the public policy of the forum to enforce a contract that is valid tested by the law of the place where it was made, but which does not comply with the requirements of the local Statute of Frauds.

These realistic considerations against the procedural view of the statute as regards conflict of laws are forcibly presented by the opinion in the LAMS CASE (Del.) (reported herewith) ante, 646." 105 A.L.R., page 661.

In the case of *Johnson v. Allen*, 158 Pac. (2d) 134 (Utah), reading from page 138, the court states:

"In making the argument that Idaho law should govern because the listing contract covered Idaho lands, the defendant fails to note the true nature of the contract involved. It does not purport to transfer an interest in Idaho land; rather it is a contract of employment. See *Toomy v. Dunphy*, 86 Cal. 639, 25 P. 130; *Kennedy v. Merickel*, 8 Cal. App. 378, 97 P. 81; *Callaway v. Prettyman*, 218 Pa. 293, 67 A. 418. Its validity is to be determined by the law of the place where the contract was made. *Callaway v. Prettyman*, supra; *Detroit & Cleveland Nav. Co. v. Hade*, 106 Ohio St. 464, 140 N.E. 180; *Selover, Bates & Co. v. Walsh*, 226 U.S. 112, 33 S. Ct. 69, 57 L. Ed. 146; *Polson v. Stewart*, 167 Mass. 211, 45 N.E. 737, 36 L.R.A. 771, 57 Am. St. Rep. 442; *Story, Conflict of Laws*, Sec. 262; *Beale, Conflicts of Laws*, Vol. II, pp. 1181, 1191.

"In *Callaway v. Prettyman*, supra, the listing contract was made in Pennsylvania to sell real estate situated in New Jersey. New Jersey law required the listing contract to be in writing and under New Jersey law the contract would have apparently been invalid. The Pennsylvania Supreme Court held that 'the validity of the contract as affected by the statute of frauds is controlled by the law of this state, and not by that of New Jersey, and Callaway's contract of employment, made in this city, was valid, as the law of the place of making the contract governs as to the formalities.' (218 Pa. 293, 67 A. 419). We conclude that the law of the place of the making governs the validity of the contract."

There is also a further annotation on this subject at 161 A.L.R. 820.

The oral contract was made and concluded in the State of California. The fact that John Jackson later at Moab, Utah, made a Will makes no difference to the situation in this case. He could have gone to any state of the Union and made a Will. A Will is ambulatory and can be revoked at any time by the testator. The Will contains nothing but a simple bequest; no terms of the alleged oral agreement are set forth in the Will; the Will is, therefore, no evidence whatsoever of the oral agreement sufficient to remove said alleged oral agreement from the operation of the Statute of Frauds. See the many cases cited in our brief.

The presumption in the absence of any indication to the contrary will always be that a contract is to be performed at the Place where it is made. 11 Am. Jur. Conflicts of Laws ¶ 117 Page 402.

Even if the alleged oral agreement was to be performed in some other state, which we do not admit, the better considered cases from the point of view of principle indicate that the Statute of Frauds of the state in which the contract is made and entered into controls as to its validity. 105 A.L.R. 675.

Plaintiff claims that the writtin agreement of April 22, 1918, is against public policy. That is immaterial in this case. The plaintiff is not seeking to enforce or to set aside said written agreement. Plaintiff pleaded and made said written agreement a part of her Complaint. She receiv-



ed approximately \$28,689.00 as the consideration for said agreement. Said agreement cannot now be set aside on the ground that it is against public policy. The matter of public policy does not enter into this case whatsoever. The only matter that enters into this agreement is: Was there a valid, binding, oral agreement that can be enforced in the face of the California Statute of Frauds?

We therefore conclude that the California Statute of Frauds is applicable and that the alleged oral agreement is not enforceable in Utah.

### POINT V

#### THE COURT DID NOT ERR ON THE QUESTION OF PLAINTIFF'S PLEA OF ESTOPPEL.

We proved at the trial of this case by the citation of many California authorities construing the above code sections that the California Courts have consistently held that an oral agreement to devise or bequeath any property or to make provision for any person by will is invalid and unenforceable.

In the case of *Bogan vs. Wiley*, decided January 14, 1946, 164 Pac. (2d) 912, reading from page 914, the California court says:

“The code sections declare that an oral contract to devise or bequeath property by will is invalid. Since their enactment our decisions have consistently held that such contracts are unenforceable.” Citing cases.

In the case of *Brought vs. Howard*, 249 Pacific 76 (Ariz.), the Arizona Court, under a statute identical with the California statute above quoted, approves and sustains the rulings of the California Courts.

The State of Massachusetts also has a similar provision and sustains the rulings of the California and Arizona courts. The cases from Massachusetts sustaining said proposition are cited in the Howard case above mentioned.

We believe that from what we have said we have conclusively shown that an oral agreement to bequeath property by will is invalid and unenforceable under the above sections of the California Code. Plaintiff, however, contends that there has been a sufficient performance of the oral agreement to take her case out of the Statute of Frauds and that the Defendant is estopped from setting up the statute because:

1. John Jackson delivered to her the Benefit Certificate, Woodmen of the World, dated the 24th day of February, 1906, (Pl. Ex J).

2. Because plaintiff pursuant to said alleged oral agreement reared, supported and educated her children and that she, therefore, fully performed her part of the oral agreement.

3. That the execution of the will of September 7, 1920, by John Jackson (Pl. Ex. I) whereby he bequeathed \$3,500.00 to each of his children constituted a part performance of the alleged oral agreement.

4. That said will is a sufficient writing evidencing said alleged oral agreement to take the case out of the above sections of the California Code.

Needless to say, we do not agree with plaintiff's contentions above set forth. We contend that there has not been a sufficient or any performance to take the plaintiff's

case out of the statute; and that there is no writing evidencing said alleged oral agreement and that plaintiff must fail on all of her contentions.

In the case of *Stevenson vs. Pantaleone* (Cal.) 21 Pacific 2d 703, reading from pages 704, 705 and 706, the Court states:

“The vital question to be determined is this: Conceding that the excluded evidence established an agreement, it is equally clear therefrom that the agreement was oral. Such being the case, was there, as claimed by the appellant, such a performance of its terms as would raise the bar of the statute of frauds?

“One of the objections upon which the offered testimony was excluded was based upon subdivision 3 of section 1624 of the Civil Code, which section, so far as material, reads as follows: ‘The following contracts are invalid, unless the same, or some note or memorandum thereof, is in writing and subscribed by the party to be charged, or by his agent: - - - 3. An agreement made upon consideration of marriage other than a mutual promise to marry. - - -’

“The objection was also predicated on section 1973 of the Code of Civil Procedure, and subdivision 3 thereof, which is in substance the same as section 1624, *supra*. Although there was no contract in writing, nor any note or memorandum thereof in writing subscribed by the parties, it is claimed by appellant that the rejected evidence discloses that the contract had been fully executed by him, and partly by her, and therefore the statute of frauds has no application here. This contention is stated in the appellant’s opening brief as follows: ‘Both parties to said agreement performed some portion thereof. Plaintiff performed each and every provision thereof on his part to be performed, and the only provision that

was not performed was the promise on the part of said Edith M. Hendrickson to change the beneficiary or beneficiaries in her policy of insurance from defendants to that of plaintiff, and this action is the result thereof.' The excluded evidence supports the following conclusions: That they agreed to get married; that they agreed to change the beneficiaries from those named in the policies, in favor of each other; that the premiums on the policies were to be paid from their community earnings; that no premiums were paid on the policy of insurance issued on the life of plaintiff's wife on account of sickness overtaking her, and, while she was sick the premiums were taken care of by a provision in the policy of insurance; that plaintiff kept up the premiums on the policies on his life; that, but for such antenuptial agreement with her and its anticipated fulfillment,, the plaintiff would not have consummated the marriage and performed the agreement on his part; that they were married; that the plaintiff thereafter changed the beneficiary named in the insurance policies carried on his life to his wife; that his wife did not change the beneficiaries named in her policy to the name of the plaintiff; that she had stated to her beneficiaries that she did not intend to make a change; that she left her policy in the custody of the plaintiff, and he knew that she had not made the change.

"Do the foregoing facts constitute part performance sufficient to take the case out of the statute of frauds? If so, then the court erred in excluding the testimony; if not, then the order of exclusion was properly made, for there can be no question that the contract was one required to be in writing.

"In *Hughes v. Hughes*, 49 Cal. App. 206, 193 P. 144, the plea was made that the defendant, in consideration of the plaintiff marrying him, agreed to deed plaintiff certain property; make a will bequeathing to her all of his property at his death, and perform certain other acts. The marri-

age was consummated, and the will was made, but defendant refused to convey the property. The above case is authority for the propositions that marriage does not take the case out of the statute of frauds; that the execution of the will was not sufficient part performance, and the oral contract could not be enforced because not executed in conformity with subdivision 3 of section 1624 of the Civil Code. Also that a court of equity will not enforce an oral antenuptial agreement to convey real and personal property after the marriage, unless it is made to appear that the promisor, by some fraud or deceit, prevented the oral agreement being reduced to writing.

"In *Peek v. Peek*, 77 Cal. 106, 19 P. 227, 1 L.R.A. 185, 11 Am. St. Rep. 244, it is held that marriage is not of itself part performance of a parol contract to convey real property in consideration of marriage, sufficient to take the case out of the statute of frauds.

"In *Gould v. Mansfield*, 103 Mass. 408, 4 Am. Rep. 573, which is cited with approval in *Hughes v. Hughes*, *supra*, is involved the principal applicable to the case at bar. The facts alleged in the complaint in that action, to which a demurrer was sustained by the court, was to the effect that the plaintiff and one Nancy Gould agreed by parol that each of them should make a will in the other's favor, and give and devise thereby all her property, both real and personal, to the other, and that neither of them was to make any different will at any time, or to dispose of her property in any manner different therefrom. Afterwards Nancy Gould made another will in favor of other parties, and died. The court said: 'There has been no part performance which amounts to anything. The plaintiff says she made a will devising her property to Nancy. But such an instrument was ambulatory, and might have been revoked by various acts, or by implication of law from subsequent changes in the condition or circumstances of the testator. - - -



The plaintiff's property is still, as it has always been, in her own hands, and subject to her own control.' See, also, *In re Edwall's Estate*, 75 Wash. 391, 134 P. 1041; *McClanahan v. McClanahan*, 77 Wash. 138, 137 P. 479, Ann. Cas. 1915A, 461.

**"In the case at bar the right to change the beneficiary named in the several insurance policies at all times rested in the insured, and, as said in the case last cited, concerning the power to make a will, the right to change the will was ambulatory, and the same right exists to change the beneficiary in a policy of insurance, and not constitute a sufficient part performance to take the case out of the statute of frauds.**

**"In *Browne*, Stat. Fr. §§452-454; *Williams v. Morris*, 95 U. S. 444, 24 L. Ed. 360, the rule is laid down that it is not enough that the act of part performance is evidence of some agreement; but it must be unequivocal and satisfactory evidence of the particular agreement itself. To the same effect is *Swash v. Sharpstein*, 14 Wash. 426, 44 P. 862, 32 L.R.A. 796; *Trout v. Ogilvie*, 41 Cal. App. 167, 182 P. 333; 58 C.J., p. 994, §190; 12 Cal. Jur. p. 898, §60.**

**"In *Henry v. Henry*, 27 Ohio St. 121; *Finch v. Finch*, 10 Ohio St. 501, it is held that, where a wife, in consideration of marriage, orally agreed to convey real property to her husband, the marriage of the parties, moving onto the land and making valuable improvements thereon, were not sufficient acts of part performance to take the case out of the statute of frauds; such acts being as much referable to his character as a husband as under the oral antenuptial agreement. In *Trout v. Ogilvie*, 41 Cal. App. 167-172, 182 P. 333, 335, it is said: To take a contract out of the operation of the statute of frauds, however, the acts relied upon must be unequivocally referable to the contract. Acts which, though in truth done in performance of a contract, admit of an explanation without supposing a con-**



tract, are not, in general, such acts of part performance as will take the case out of the operation of the statute. 36 Cyc. 645. The acts relied upon must clearly appear to have been done in pursuance of the contract, and to result from the contract and not from some other relation.' (See cases there cited.)

"In *Baker v. Bouchard*, 122 Cal. App. 708, 10 P.(2d) 468, the decision of the court, so far as material to the case at bar, is epitomized in the syllabus as follows: 'In an action to enforce a trust in real property alleged to have arisen by virtue of an oral agreement between plaintiff and defendant's intestate whereby the decedent agreed, in consideration of plaintiff taking up her residence in decedent's home and providing and caring for him during his declining years, that he would make a will devising to her the real property in question, which oral agreement plaintiff claimed she fully performed, an attempted will by decedent devising said property to plaintiff which did not refer to the alleged oral agreement and which was void for want of compliance with statutory provisions governing wills, did not constitute a sufficient memorandum of the alleged oral agreement to comply with the requirement of section 1624 of the Civil Code and section 1973 of the Code of Civil Procedure. In such action the fact that plaintiff fully performed her part of the alleged oral agreement did not take the contract out of the operation of the statute of frauds.

"In *O'Brien v. O'Brien*, 197 Cal. 577-586, 241 P. 861, it is held that neither subsequent marriage nor the execution of a will pursuant to an oral antenuptial agreement to make a will is such part performance as will relieve the contract from the operation of the statute of frauds.

"In the case before us, the change of the beneficiary by the plaintiff may be attributable to his character of husband, and nothing else. So far as

the wife is concerned, she did no act toward performance.

“In *Luders v. Security Trust, etc., Bank*, 121 Cal. App. 408, 9 P. (2d) 271, 272, in an action to enforce a trust based on an alleged oral agreement, it is said: ‘Nor does this case fall within the rule that the statute of frauds cannot be invoked in case of a completed oral contract (*Schult v. Noble*, 77 Cal. 79, 19 P. 182; *Colon v. Tosetti*, 14 Cal. App. 693, 113 P. 365, 366), for the contract now sued upon was not completed. The reason that the contract is now in court is because the decedent did not perform his part of the alleged agreement. - - - ’

“From the foregoing review of the evidence offered by the plaintiff, it is clear that Edith M. Hendrickson did nothing that could be construed as an act of part performance of the oral ante-nuptial agreement; even the act of marriage did not constitute part performance. The only act performed by plaintiff which could be attributable to the said agreement was the change in the beneficiary in the policies of insurance issued on his life, and, under the above-cited authorities, such act was insufficient to raise the bar of the statute. Such being the case, the ruling of the court sustaining the objections to the offered evidence was correct, because the agreement was not in writing and no facts were shown sufficient to support its enforcement as an executed oral agreement. The other questions raised, therefore, become immaterial.”

The Supreme Court of the State of Arizona in the case of *Brought vs. Howard*, 249 Pacific 76, reading from pages 79 and 80, states:

“ ‘Jonathan R. Brought’s will in favor of plaintiff does not on its face purport to have been made in pursuance of any contract to make it. It merely indicates an intention to make a testamentary gift to the plaintiff. It is not a memorandum of any

contract to will or devise. As is said in *Zellner v. Wassman*, 184 Cal. 80, 193 P. 84:

“The pre-eminent qualification of a memorandum under the statute of frauds is ‘that it must contain the essential terms of the contract, expressed with such a degree of certainty that it may be understood without recourse to parol evidence to show the intention of the parties.’ 5 *Browne on Statute of Frauds*, sec. 371. Accordingly, it has been held in this state that an undelivered deed cannot be regarded as a sufficient memorandum of an oral agreement for the sale of land therein described when the deed is silent as to the terms of the alleged agreement and merely conveys the land from one party to another. *Swain v. Burnette*, 89 Cal. 564, 570, 26 P. 1093. In other jurisdictions the same reasoning has been applied to a will, for some reason ineffective upon the death of the testator, which makes no mention of the terms of the contract in pursuance of which it is alleged to have been executed. *Allen v. Bromberg*, 163 Ala. 620, 50 So. 884; *McClanahan v. McClanahan*, 77 Wash. 138, 137 P. 479, Ann Cas. 1915A, 461. A potential factor in furtherance of fraud would be engendered were a will containing a simple bequest permitted to operate as evidence of a binding contract to make such a bequest. It must therefore be held that there is no written memorandum of the agreement here in suit.’

“See, also, *Watkins v. Watkins*, supra; *Hale v. Hale*, 90 Va. 728, 19 S. E. 739; *In re Edwall’s Estate*, 75 Wash. 391, 134 P. 1041; *Cavanaugh v. Cavanaugh*, 120 Wash. 487, 207 P. 657.

“For the above reasons we conclude the plaintiff has failed to show herself entitled to the equitable relief sought, and the court did not err in so deciding.”

In the California case of *Baker vs. Bouchard*, 10 Pacific 2d 468, reading from page 469, the Court states:

**“In connection with this instrument, it is to be observed that it contains no reference to the alleged oral agreement. - - -**

**- - - - “Section 1624 of the Civil Code and section 1973 of the Code of Civil Procedure expressly provide that an agreement to devise or bequeath property or to make provision for any person by will is invalid unless the contract or some note or memorandum thereof is in writing and subscribed by the party charged or by his agent. It is not contended that there was any written memorandum of the alleged agreement **other than the invalid will.** This instrument contained a simple devise of the real property in question to appellant **without reference to any agreement in respect thereto.** It does not, therefore, constitute a sufficient memorandum of the alleged oral agreement to comply with the requirement of the above-mentioned statutes. Zellner v. Wassman, 184 Cal. 80, 193 P. 84.**

In the case of Freeman, et al., vs. River Farms Co. of California, et al., 44 Pacific 2d 422, reading from page 423, the Court states:

**“Respondents contend that appellant is estopped to set up the statute of frauds as a defense, but we have found no authority to support respondents’ contention under the facts presented here. Respondents take the position that as they had performed the work under their contract with the levee district, appellant is estopped from relying upon the statute. We believe this position to be untenable. Assuming, as do respondents that under their alleged agreement with appellant, respondents agreed to do said work for the levee district (which assumption appears to be contrary to the fact), performance by one party of an alleged agreement does not always remove the case from the operation of the statute and ordinarily only such performance as is **specified in the statute itself is sufficient for that purpose,** O’Brien v. O’Brien, 197 Cal. 577, 241 P. 861; Baker v.**

Bouchard, 122 Cal. App. 708, 10 P. (2d) 468, Forbes vs. City of Los Angeles, 101 Cal. App. 781, 282 P. 528; Trout v. Ogilvie, 41 Cal. App. 167, 182 P. 333; Booth v. A. Levy & J. Zentner Co., 21 Cal. App. 427, 131 P. 1062. 'Furthermore, it is clear that, in order to take a contract out of the operation of the statute of frauds, the acts relied upon as establishing part performance must be unequivocally referable to the contract. If such acts, though in truth done in performance of a contract, admit of an explanation without supposing a contract, they do not generally constitute such part performance as to remove the case from the operation of the statute.' Baker v. Bouchard, *supra*, 122 Cal. App. page 711, 10 P. (2d) 468, 469; see, also, O'Brien v. O'Brien, *supra*; Trout v. Ogilvie, *supra*."

In the California case of Luders v. Security Trust & Savings Bank, et al, 9 Pacific (2d) 271, reading from pages 271, 272 and 273, the Court states:

"In June 1923, deceased executed a will in which she bequeathed her property to appellant 'for her faithful service to me.' Appellant seeks to bring this case without the provisions of the Statute of Frauds (Civ. Code, § 1624) by reason of this will, and also by her partial performance of the terms of the contract with deceased. She maintains that the will was a sufficient note or memorandum in writing of the contract to take it out of the statute.

"These two arguments of appellant have been resolved against her by the decisions of the Supreme and Appellate Courts of this state. These decisions were reviewed by this court in the recent case of Cazaurang v. Carrey, 4 P. (2d) 259, 261, where it was said: 'We think no such full performance is here shown, as takes this agreement or these agreements out of the statute. Hughes v. Hughes, 49 Cal. App. 206, 193 P. 144, 145; Zellner v. Wassman, 184 Cal. 80, 193 P. 84, 86; O'Brien v. O'Brien, 197 Cal. 577, 241 P. 861, 864. In the case



of *Hughes v. Hughes*, the court said: 'The subsequent making of defendant's will, in favor of the plaintiff, following the marriage, was not such part performance of the oral agreement to make such will as to take the alleged contract out of the statute of frauds.' In *Zellner v. Wassman*, the court said: 'Agreements to leave property by will must be reduced to writing or evidenced by some written note or memorandum; for, by virtue of the 1905 Amendment to section 1624 of the Civil Code, they are within the purview of the statute of frauds. It is admitted that the agreement of the son to leave \$5,000 by will herein sued upon was not reduced to writing, and that no written note or memorandum thereof was made **unless the will executed by deceased, a copy of which was attached to the complaint, fulfills the requirements of the statute in that respect.** The will in question contained a simple bequest of \$5,000 to plaintiff, without reference to any agreement in respect thereto. The pre-eminent qualification of a memorandum under the statute of frauds is **'that it must contain the essential terms of the contract, expressed with such a degree of certainty that it may be understood without recourse to parol evidence to show the intention of the parties.'** 5 *Browne on Statute of Frauds*, § 371. Accordingly, it has been held in this state that an undelivered deed cannot be regarded as a sufficient memorandum of an oral agreement for the sale of land thereindescribed when the deed is silent as to the terms of the alleged agreement and merely conveys the land from one party to another. *Swain v. Burnette*, 89 Cal. 564, 570, 26 P. 1093. In other jurisdictions the same reasoning has been applied to a will, for some reason ineffective upon the death of the testator, which makes no mention of the terms of the contract in pursuance of which it is alleged to have been executed. *Allen v. Bromberg*, 163 Ala. 620, 50 So. 884; *McClanahan v. McClanahan*, 77 Wash. 138, Ann. Cas. 1915A, 461, 137 P. 479. A potential factor in furtherance of fraud would be engendered were a will containing a simple bequest



permitted to operate as evidence of a binding contract to make such a bequest. It must therefore be held that there is no written memorandum of the agreement here in suit. Nor does this case fall within the rule that the statute of frauds cannot be invoked in case of a completed oral contract (*Schultz v. Noble*, 77 Cal. 79, 19 P. 182; *Colon v. Tosetti*, 14 Cal. App. 693, 113 P. 365, 366), for the contract now sued upon was not completed. The reason that the contract is now in court is because the decedent did not perform his part of the alleged agreement by causing to be in existence at the time of his death a will bequeathing \$5,000 to plaintiff. The mere execution of a will was not a performance of the contract.'

The Court concludes at page 273 as follows:

"The will which deceased executed in 1923 did not 'contain the essential terms of the contract, expressed with such a degree of certainty that it may be understood without recourse to parol evidence to show the intention of the parties,' as required in the case of *Zellner v. Wassman*, supra, and was not a sufficient note or memorandum of the contract to bring this case without the provisions of the statute of frauds."

In the case of *Brooks vs. Whitman*, 10 Pac. (2d) 1007, Calif. reading from page 1009, the Court states:

"The making of a will is absolutely no evidence of an agreement to make a will. As was said in *Monson vs. Monsen*, 174 Cal. 97, 102, 162 Pac. 90, 92: 'The making of a will has no tendency to show that there is a contractual obligation to make such will.' See also *Zellner v. Wassman*, 184 Cal 80, 86, 193 Pac. 84, 87, wherein it is said, 'a potential factor in furtherance of fraud would be engendered were a will containing a simple bequest permitted to operate as evidence of a binding contract to make such a bequest. And in the same category and for the same reasons would fall statements

made by a party as to the fact of his having made a will in favor of one claiming as in the present case.”

In the case of *DeMattos vs. McGovern*, 77 Pac. (2d) 522 (Cal), reading from pages 523 and 524, the Court states:

“The main difference between this case and those which have gone before is that the appellant herein insists that notwithstanding his failure to pursue the regular remedy which the law has given him, he should be permitted to invoke the equity jurisdiction to give him the relief which the law denies. On the theory that because he continued in the employment of the deceased in reliance upon the alleged agreement that agreement was partly executed he argues that the case is taken out of the statute of frauds. The premise is not sound. The services were rendered under a separate contract of employment. The same is to be said about the representation that a will had already been made in accordance with such an agreement. The execution of the will is not part performance of the alleged contract. *Notten v. Mensing*, 3 Cal. 2d 469, 474, 45 P. 2d 198. The right to revoke a will lies with the testator until the time of his death, and, unless limited by an agreement in writing, equity cannot intervene. *Notten v. Mensing*, supra, 3 Cal. 2d 469, page 473, 45 P. 2d 198.

“The case is controlled by these settled principles: Under section 1624 of the Civil Code and section 1973 of the Code of Civil Procedure, an agreement to make a will, or to leave property by deed or will is invalid unless in writing. An agreement not to revoke a will already made is, in effect, the same as an agreement to make a will, and must also be in writing. *Cazaurang v. Carrey*, 117 Cal. App. 511, 517, 4 P. 2d 259; *Notten v. Mensing*, 3 Cal. 2d 469, 473, 45 P. 2d 198.

“An oral agreement to make a will or to leave property by deed in compensation for services rendered, or to be rendered, is not enforceable as such.

The remedy is one in quantum meruit for the value of the services rendered. Zellner v. Wassman, 184 Cal. 80, 84, 87, 193 P. 84; Morrison v. Land, supra, 169 Cal. 580, pages 586, 590, 147 P. 259; Ruble v. Richardson, 188 Cal. 150, 154, 204 P. 572; Lauritsen v. Goldsmith, 99 Cal. App. 671, 675, 279 P. 168; Burr v. Floyd, 137 Cal. App. 692, 696, 31 P. 2d 402.

“Equity follows the law and, when the law determines the rights of the respective parties, a court of equity is without power to decree relief which the law denies. 10 R.C.L., p. 382; Magniac v. Thomson, 15 How. 281, 299, 302, 14 L. Ed. 696; Federal Land Bank v. Wilmarth, 218 Iowa 339, 252 N.W. 507, 513, 94 A.L.R. 1338.

“ - - - There is, however, the complete harmony in the cases holding to the rule that, where the oral contract to compensate by will was made in consideration of services rendered or to be rendered, the promisee's remedy is one at law to recover the reasonable value of his services. It is equally well settled that before the promisee may maintain an action for that purpose he must file a claim against the estate. Morrison v. Land, supra, 169 Cal. 580, page 585, 147 P. 259. - - - ”

The plaintiff in the case at bar is not seeking compensation for services rendered nor for money expended by her in rearing, supporting and educating her children, which she claims she did under an oral agreement. Her claim is not based on quantum meruit. At the pre-trial of this case on March 23, 1951, plaintiff eliminated all matters relating to quantum meruit or the reasonable value of services rendered and all matters relating to quantum meruit were stricken from the Complaint (R. page 93). Plaintiff filed no claim whatsoever against the estate on the basis of

quantum meruit. We believe that the cases cited by us conclusively demonstrate that plaintiff is not entitled to recover in this action; quantum meruit is entirely out of the case, no claim was filed based on quantum meruit, and she has stated no facts that warrant any recovery whatsoever in equity.

Counsel, at page 45 of his brief, complains about the deceased revoking his "Contract Will," presumably the will made by John Jackson on September 7, 1920 (Plaintiff's Exhibit I).

The right to revoke a will lies with the testator until the time of his death and unless limited by an agreement in writing, equity cannot intervene. *Notten v. Mensing*, 45 Pac. (2d) 198 (Cal.) and other cases above cited.

57 Am. Jur., § 458, page 322, reads in part as follows:

"§ 458. Right, Power, and Capacity to Revoke. Revocability is an essential characteristic of a will. Except where the testator subsequently becomes incompetent, he retains the power of revocation as long as he lives, and this is true regardless of whether he retains possession of the will or delivers possession to the beneficiary or to a third person. Wills are revocable to such an unlimited degree that even an express provision in a will providing that it is not revocable in no wise prevents the will from being actually revocable.

"A will executed pursuant to a contract to make a will is revocable and is not entitled to probate if a revoking will is executed; however, the testator cannot relieve himself of the obligation of the contract by revoking the will. In other words, a will is revocable but a contract to make a will is not. - - - "

See also, O'Hara vs. O'Hara, annotated at 163 A.L.R. 1444.

We especially call the court's attention to the case of *In re Edwall's Estate* 75 Wash. 391, 134 P. 1041 for an excellent treatise of a number of questions involved in this action—we will cite only that portion of the syllabus of said case at page 1041 which reads as follows:

“A husband and wife, each of whom owned real property, executed deeds simultaneously by which each conveyed his or her real property to the other and delivered them in escrow under an agreement that the deed of the one first dying should then be recorded. They subsequently executed wills simultaneously, which were attested by the same witnesses, to take the place of such deeds, by which each gave his or her real and personal property to the other. Neither the deeds nor the wills on their face made any reference to an alleged oral agreement that the wills should be irrevocable except by agreement or upon notice. Held, that such oral agreement was void and unenforceable under the statute of frauds; the deeds and wills not constituting sufficient evidence thereof in writing.”

### CONCLUSION

We respectfully submit that under the foregoing argument and authorities the trial court did not err in its decision. The judgment appealed from should therefore be affirmed.

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