

1952

# Pearl McConkie Perry v. J. Archie McConkie and William H. McConkie : Brief of Appellants

Utah Supreme Court

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Colton and Hammond; Dean W. Sheffield; Attorneys for Appellants;

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**IN THE SUPREME COURT OF THE  
STATE OF UTAH**

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**FILED**

JUL 31 1952

**PEARL McCONKIE PERRY,***Plaintiff and Respondent*

vs.

**J. ARCHIE McCONKIE and  
WILLIAM H. McCONKIE,***Defendants and Appellants.*

Clerk, Supreme Court, Utah

Case No.

**7811**

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**Appellants' Brief**

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**COLTON and HAMMOND****DEAN W. SHEFFIELD***Attorneys for Appellants.*

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# IN THE SUPREME COURT OF THE STATE OF UTAH

PEARL McCONKIE PERRY,

*Plaintiff and Respondent*

vs.

J. ARCHIE McCONKIE and  
WILLIAM H. McCONKIE,

*Defendants and Appellants.*

Case No.  
**7811**

## Appellants' Brief

### Preliminary Statement

This action was brought by Plaintiff, Pearl McConkie Perry, against the Defendants, her two brothers, to have them adjudged trustees of the lands described in her complaint, for the heirs of the estate of Virtus F. McConkie, deceased, and to require them to account for the income and proceeds derived therefrom. She is the only dissatisfied heir of Virtus McConkie, and bases her claim upon the theory that the title to the lands in question was in the name of and belonged to Virtus F. McConkie at the time of his

death, but were not inventoried or included in his estate in the probate thereof; and that certain assignments transferring and assigning the equity in these lands to Virtus McConkie had been altered by removal of the name of Virtus F. McConkie, and insertion of the name of J. Archie McConkie, one of the defendants.

Defendants' theory was that J. Archie McConkie was the sole owner of the property by virtue of patents from the State of Utah; that the father hadn't any interest therein; that any interest plaintiff may have had under her father's estate, assuming such an interest, passed to her mother by virtue of an assignment to the mother and a Decree of Distribution in the Estate, which distributed all the particularly described property and also all other undescribed and unknown property of the estate, to her mother. Defendants also raised the question of the Statute of Limitations; that this was a collateral attack which could not be properly made against the decree, and raised the question of whether the plaintiff was not suing the wrong parties.

From a decision of the trial court that defendants hold the property in trust for the heirs of Virtus F. McConkie, deceased, and that these heirs are entitled to an accounting, the defendants have appealed.

### Statement of Facts

Virtus F. McConkie died February 20, 1920 at Maeser, Uintah County, Utah. His widow, Caroline E. McConkie was appointed administratrix and proceeded to administer the estate. She filed the requisite inventory and appraisement, but did not include in the inventory the property now in dispute, which is described frequently in the record as the LaPoint property, and will be referred to herein by that designation.

All of the heirs met together in the office of Tom O'Donnell, an attorney, during the course of the probate, and at that time the rights of all the children (except Marie who was then under age and who signed later Tr. 139), assigned all their rights and interest in the estate to their mother. (Tr. 8, 139). Thereafter, the estate which had a value of approximately \$15,000 was distributed to the mother. (See probate file, admitted in evidence Tr. 54). The decree of distribution contained an omnibus clause which distributed to Caroline E. McConkie all property owned by Virtus F. McConkie, whether known or unknown. (Ex. Probate File).

The two sons, Archie and William, continued to help the mother operate the property during the

probate of the estate, and thereafter, and the funds derived therefrom were used to defray the family expenses. During a part of this time at least, the family group living together consisted of the mother, Marie, Leona, the two sons and the plaintiff and her four children. (Tr. 117). After the probate of the estate it was agreed that Archie and William should have the property upon their payment to each of the girls the sum of \$2,000, and their supporting and taking care of the mother's financial needs during her lifetime.

There is considerable evidence that as early as 1927 Pearl agitated for more money for her share in the LaPoint property, and that the boys, upon recommendation of their mother gave each of the girls an additional \$1,000, and that in fact, Pearl received a total of \$3500. (Tr. 129, 130, 174).

Prior to her death Mrs. Caroline E. McConkie conveyed the Maeser property to William with the exception of the house which she conveyed to Marie who took care of her mother's personal needs during her declining years. (Tr. 119).

Prior to their father's death, Archie and William and their father worked the ranch properties as partners, and had done so for many years. This included the home property at Maeser, and, after its acquisi-



tion, the property at LaPoint. After their father's death Archie and William continued to work together, although it appears that they kept the LaPoint property separate from the Maeser property, which they operated along with their mother.

The plaintiff introduced evidence to the effect that she at no time prior to 1947 discovered that the LaPoint property was in her father's name, and that she only made this discovery when information from an uncle and a third party caused her to investigate. (Tr. 15, 16, 17) This, despite the fact that she lived next door to her parents with her first husband while she was married to him, and until she divorced him, and then went to live with her mother and brothers and sisters upon her divorce shortly after her father's death. (Tr. 25).

She testified that at the time of the assignment of their rights to their mother in O'Donnell's office, that the only discussion as to the LaPoint property was the statement by the mother, affirmed by the two boys, to the effect that this property belonged to the two boys (Tr. 23), and she knew at the time that the boys were living at the LaPoint property (Tr. 23). For a period of time after her father's death she lived at the LaPoint property with her brothers (Tr. 24, 25), after her divorce from her first husband, and before she remarried. (Tr. 23, 24).

She could not remember when she found out about the existence of the LaPoint property, and didn't know what had been traded for it (Tr. 26, 29, 34). Her statement was: (Tr. 30) "Well I don't know when—I know that the folks had an interest over there but I didn't know anything about the deals or anything about it, and they swore at the time in Tom O'Donnell's office at the time we signed that paper that was all the interest my dad had." She said that she thought it was in her dad's name, but they said no it belonged to the boys. (Tr. 38).

When cross examined with respect to certain statement made in a deposition wherein she had answered that she knew her father had turned in cattle and pasture land on the purchase of the LaPoint land, she sought to qualify these statements by saying that she found these things out in 1949 (Tr. 35, 36).

J. Percy Goddard testified as an expert that certain assignments relating to the LaPoint property and which appear in the record as exhibits A, B and C, had been altered, in that first names therein had been removed, and the name J. Archie had been substituted therein, leaving the last name McConkie as it was originally. (Tr. 55, 56, 57). He also admitted on cross examination that a similar alteration appeared in one assignment in said exhibits prior to the

assignment to McConkie, (Tr. 63), so that this practice was not unique.

A stipulation was offered by counsel for the defendants that the assignments were changed by J. Archie McConkie at the request of his father. Exhibit F. is a paragraph from an answer filed in a previous suit brought by this same plaintiff, (which case was dismissed without prejudice) in which J. Archie McConkie alleged that he erased the name of Virtus F. McConkie and inserted his own name, at the request of his father Virtus F. McConkie and in the presence of his father, William and Caroline E. McConkie.

The plaintiff failed utterly to prove any of the requisite facts under which she would be entitled to a recovery. The only testimony she introduced even remotely bearing on the change in the assignments was her testimony that she and her attorney asked Archie and Will if they hadn't erased her dad's name on the assignments and put in Arch's and they said yes, and Arch said she couldn't do anything about it, and Will said they would all stick together (Tr. 10, 11).

On the other hand, Marie McConkie Johnson, the only living heir of Virtus F. McConkie, aside from the litigants, and who had as much to gain as did the plaintiff by claiming to have not known

about the situation with respect to the LaPoint property, testified quite frankly that she did know the details of the transaction for the LaPoint property. That 80 acres of land in Ashley Ward and some cows were traded for it (Tr. 164, 165); that Will and Arch and their father worked as partners (Tr. 171) and that at the meeting in O'Donnell's office the LaPoint property was discussed as belonging to the boys.

She also testified to several conversations with Pearl subsequent to her father's death, and up to the early part of 1946, which indicated that Pearl, during all that period of time was aware of the situation with respect to the LaPoint property, and had been trying to get her to join in to get a part of the property away from the boys. (Tr. 174, 178, 179). She also testified to a conversation in 1928 when Pearl told her that she had got the girls an additional \$1,000 as a share in the LaPoint property (Tr. 174, 176). She also told of a conversation in July 1946, in which Pearl stated she felt she should get more from the LaPoint property (Tr. 177) and that she didn't think she had got her share from her father's estate.

Marie also testified that before her father's death, she had heard talk at home to the effect that the LaPoint property had been fixed to Arch, and that the LaPoint property was in Archie's name when her father died. (Tr. 168, 184).

Verdin Johnson, husband of Marie McConkie Johnson corroborated his wife as to the 1946 conversation. (Tr. 190, 191).

William H. McConkie testified that during his father's lifetime, he, Archie and their father ran their cattle together and the ranches (Tr. 104). That the LaPoint property was acquired in April 1918. (Tr. 104); that the assignments were changed prior to his father's death. (Tr. 135).

With respect to the meeting in O'Donnell's office when the heirs assigned their rights to the mother, he testified that he and his mother had previously talked to O'Donnell, and that it was O'Donnell's advice that they make such a transfer (Tr. 108, 115). That they carried this information to the rest of the family, and that it was agreed upon and thereupon they went to O'Donnell's office and made the assignment.

He further testified that at the meeting with O'Donnell the LaPoint property was discussed pro and con and thrashed out (Tr. 110); that it was fully discussed before they signed, as belonging to the boys (Tr. 110, 111, 116); and that the mother went over with them what property belonged to the estate and what belonged to the boys (Tr. 116). He also testified that the agreement to pay the girls \$2,000 each

arose after the property had been assigned to the mother, and came about as a result of the mother stating she figured each should have \$2,000 out of the estate, and if he and Archie would pay each of the girls \$2,000 and take care of her so long as she lived, she would give them her property (Tr. 118, 119). He also testified that prior to his mother's death, she deeded to he and Archie all her property, including any interest she had in the LaPoint property. (Tr. 119, 120). An objection was sustained to this answer, but plaintiff made no motion to strike it. (Tr. 120). Defendant's exhibit 3, a quit claim deed to the land in LaPoint from the mother to Archie was offered in evidence but an objection to it was erroneously sustained. (Tr. 121)

William also testified to the payment to Pearl of her \$2,000 and an additional \$1500 beyond this (Tr. 123, 124 130), which was paid at the mother's recommendation (Tr. 129); that this was in January of 1927 (Tr. 129, 130).

J. Archie McConkie testified that they agreed to assign all their rights over to their mother prior to the time that he and William agreed to pay the girls \$2,000 (Tr. 244); that after his father's death he and Will operated the LaPoint land as partners (Tr. 247); that they were the only ones who owned

it, and at the time of his father's death they claimed it as their own and so stated in O'Donnell's office.

Appellants have outlined the evidence in considerable detail, because they believe that the trial court erred in finding as he did thereon, and that the evidence on behalf of the plaintiff is insufficient to sustain the court's findings conclusions and judgment, and that to the contrary, the evidence clearly supports the defendants' position throughout.

### **Statement of Points Relied Upon by the Appellant**

1. There was no evidence introduced to prove that Virtus F. McConkie owned the LaPoint property at the time of his death, nor any other of the essential allegations of Plaintiff's complaint.

2. The evidence is insufficient to support the following findings of the Court:

A. The evidence is insufficient to support the part of finding No. 9 wherein the Court found that "The said property and assignments referred to in paragraphs 6, 7 and 8 of these findings were owned and possessed by the said Virtus F. McConkie at the time of his death.

B. The evidence does not support finding No. 10 that "Subsequent to the making and delivery of said assignments on April 29, 1918, to Virtus F. McConkie as set forth in paragraphs 6, 7 and 8 of these findings the defendant J. Archie McConkie falsely

and fraudulently, and with the intent to defraud the plaintiff and other heirs at law of the estate of Virtus F. McConkie, deceased, erased, obliterated and removed the name of Virtus F. McConkie from said written assignments and inserted in the place thereof his own name, J. Archie McConkie; and also at said subsequent time erased in the affidavits of citizenship upon said assignments the signature of Virtus F. McConkie and inserted his own name in place thereof; that the defendant J. Archie McConkie erased, obliterated and removed the name of the said Virtus F. McConkie from said instruments as hereinabove set forth with the knowledge, acquiescence, consent and encouragement of the defendant William H. McConkie and upon an understanding and agreement that the gains to be obtained from aid fraudulent scheme in thus removing the name of the said Virtus F. McConkie from said instruments would be shared by the defendants, J. Archie McConkie and William H. McConkie."

C. The evidence does not support that part of finding No. 11 wherein the court found: "Upon the death of the said Virtus F. McConkie, the defendants, J. Archie McConkie and William H. McConkie, went into possession of the said real property, and the said defendants stated to the plaintiff that they were the owners of said land and that none of the same constituted any portion of the said estate of Virtus F. McConkie, deceased; that plaintiff and other daughters of deceased believed said defendants in the statements which they thus made and relied thereon, and said statements were falsely and fraudulently made with the intent to deceive the plaintiff and the other heirs of the estate of Virtus F. McConkie, deceased; . . ."

D. The evidence is insufficient to sustain the



Court's finding No. 12, "That plaintiff, at all times until on or about the 9th day of April, 1949, believed that said property belonged to the said defendants, J. Archie McConkie and William H. McConkie; that, on or about the date last mentioned, plaintiff, for the first time, learned that the assignments mentioned in paragraph 6, 7 and 8 of these Findings of Fact had been forged and altered as hereinabove set forth; that upon learning such facts plaintiff immediately made demand upon the defendants, and each of them, that the estate of Virtus F. McConkie be re-opened for probate or that said defendants make satisfactory accounting and settlement with plaintiff and the other heirs of the said Virtus F. McConkie, deceased; that said defendants failed and refused to restore said property to the heirs of said estate, or to make any accounting whatsoever and on the contrary at all times since said demand was made upon them the defendants have asserted that said property belonged to the defendant J. Archie McConkie in his own right."

E. The evidence is insufficient to support the Court's finding No. 13, "That shortly prior to February 14, 1946, the defendant J. Archie McConkie presented to the State Land Board of the State of Utah, the said forged, altered and mutilated assignments and affidavits of citizenship and the State of Utah, without detecting that said instruments had been forged, altered and mutilated, issued patents to the real property hereinabove described to the defendant J. Archie McConkie, which said patents are recorded in the office of the County Recorder of Uintah County, State of Utah, in Book 33 of Deeds at page 567 and 569 and that, as a result of said recording, said defendant J. Archie McConkie appears to be the record owner of the said real property.

F. The evidence is insufficient to support the Court's finding No. 15, that "The court finds and decides that plaintiff and the other heirs of Virtus F. McConkie, deceased, are the owners of the property described in paragraphs 6, 7 and 8 of these Findings . . . and the court now finds that plaintiff and the other heirs of the said Virtus F. McConkie, deceased, are entitled to such an accounting. . . ."

G. The evidence is insufficient to support the Court's finding No. 3 of Findings of Fact on Defendants' Answer, First Defense, wherein the court found that Plaintiff's action was not barred by the Statute of Limitations, Sec. 104-2-24 (3), U.C.A. 1943, and that plaintiff did not learn that the real property was owned by Virtus F. McConkie, nor did she learn such facts as would put a person of ordinary intelligence and prudence on inquiry until within three years from the filing of her complaint.

H. The evidence is insufficient to sustain the Court's finding No. 1 on Defendants' Second Defense, wherein the court found that J. Archie McConkie is not the owner in fee of the property by virtue of the patents issued to him by the State of Utah, but that the Defendant J. Archie McConkie, holds title to said lands in trust for plaintiff and the other heirs of Virtus F. McConkie.

I. The evidence is insufficient to sustain finding No. 3 on Defendants' Third Defense, wherein it is found: "It is not true that there was an agreement between the heirs of Virtus F. McConkie, deceased, to the effect that the defendants would take over all of the assets of the estate referred to as the LaPoint property and pay to the three daughters Pearl McConkie Perry, Marie McConkie and Leona McConkie,

the sum of \$2,000 each and, in addition thereto, provide and care for the said Caroline E. McConkie for the rest of her natural life; in this connection, the court finds that the said three daughters last mentioned agreed to take the sum of \$2,000 each as their share of the estate of deceased which had been listed and set forth in the inventory and appraisalment therein filed; that the gross inventory of said listed estate which did not include the land or water stock described in plaintiff's complaint was \$15,040, and one-third of the value thereof belonged to Caroline E. McConkie, the mother, and the other two-thirds thereof, namely approximately \$10,000 in value, belonged to the five sons and daughters of deceased, and that one-fifth of said \$10,000 valuation equaled \$2,000; and, accordingly, and based upon said specific inventory and listing of the properties of deceased, the plaintiff and her sisters agreed with defendants to accept the sum of \$2,000 each in settlement of their distributive portion of said estate; that each of said daughters was paid the sum of \$2,000; it is not true that the plaintiff objected to this amount and insisted that she was entitled to a greater sum, and it is not true that the plaintiff was paid an additional \$1,000 by way of distribution from said estate; and, in this connection, the court finds that the plaintiff received an additional \$1,000 from the defendants by way of an insurance settlement on plaintiff's property, and not otherwise."

J. The evidence does not sustain finding No. 4 of Findings of Fact on Defendants' Third Defense wherein it found: "The court finds that, when plaintiff and her sisters signed the Assignment set forth in paragraph 1 above, they signed the same in reliance upon the representation made by Caroline E. McConkie and the defendants to the effect that the real property described in paragraphs 6, 7 and

8 of these Findings on plaintiff's complaint did not belong to Virtus F. McConkie deceased; that the agreement with respect to the payment of \$2,000 to the daughters of said deceased covered only the property of said decedent which had been listed in the inventory and appraisement and was not intended to affect the property described on plaintiff's complaint; and the court now finds that the plaintiff is not estopped by reason of accepting said \$2,000 from claiming her interest in the real property which was omitted from the said inventory and appraisement."

3. Under plaintiff's own evidence she would not be entitled to the award which the court made, because J. Archie McConkie and William H. McConkie clearly had an interest in the LaPoint property during the lifetime of the father.

4. Plaintiff's right of action, if one ever existed is barred by the Statute of Limitations, and by laches.

5. Plaintiff waived any interest which she may have had in the LaPoint property by the assignment to her mother, to whom any such interest was distributed by the Decree of Distribution which may not be circumvented by this attack upon it.

6. Plaintiff's suit is a collateral attack upon the Decree of Distribution in the probate of the estate of Virtus F. McConkie, which may not be maintained.

## **Argument**

### **Points I and II**

**Plaintiff failed to prove that Virtus F. McConkie owned the LaPoint property at the time of his death; and the evidence is insufficient to sustain the findings of the Trial Court.**

These two Points lend themselves to a unified treatment, in that they require a review and discussion of the evidence adduced on the trial of the case.

In order to sustain her position plaintiff must prove that Virtus F. McConkie was the owner of an equity in the LaPoint property at the time of his death; that J. Archie McConkie and William H. McConkie fraudulently altered the assignments thereafter, and wrongfully claimed the property as their own.

Plaintiff failed to produce any evidence as to ownership of the property by Virtus F. McConkie. The most which could possibly be said for her proof would be that the assignments to the property, at one time stood in the name of Virtus F. McConkie, and that his name had been erased therefrom and the name of J. Archie McConkie inserted therein. Her expert witness in this regard admitted however, that

a similar situation had occurred in the assignments prior to the assignment to McConkie (Tr. 63). Thus, little if any weight can be afforded such an indecisive bit of evidence.

Yet, from this single shred of evidence as to a situation which may have existed with respect to the assignments, everything else which the court found must be inferred. That is, that the substitution of names was after the father died, that it was fraudulent and to deceive and defraud she and the other heirs.

She produced no direct evidence of actual ownership by Virtus F. McConkie, and in fact conceded that she knew that the boys had an interest in the property (Tr. 34). There is a single isolated hearsay statement allegedly made to her and attributed to an uncle to the effect that they hadn't given her all she was entitled to (Tr. 15, 16). Nor is there anything particularly to show that the uncle had any special information with regards to the situation. Again, it is interesting to note that the uncle allegedly did not reveal this information to her for twenty six years after her father's death, during which time he apparently harbored it to himself. No explanation for this odd behavior is inserted into the record, and bears every evidence of being an afterthought not on the part of the uncle, but on the part of the plaintiff.

Nowhere in the record did anyone testify that the father owned the property at the time of his death, that the change in the assignments were made after the father's death, or even that it was reputed that the father had some interest in the property.

The plaintiff contends that the defendants have perpetrated a fraud upon her. This she was obliged to prove by clear and convincing evidence. *Chapman v. Troy Laundry Co.* 87 Utah 15, 47 P. 2d 1054; *Rawson v. Hardy*, 88 Utah 31, 48 P. 2d 473.

Furthermore, the fraud must be completely proved. Plaintiff must do more than merely establish a state of facts from which an inference of fraud may or may not be reasonably drawn. *Wilcox v. West*, 45 Cal. App. 2d 267, 114 P. 2d 39. Fraud is never presumed, but must be established by clear and convincing evidence. *Goff v. Boma Inv. Co.* 116 Colo. 359, 181 P. 2d 459; *Kurz v. Farmers United Co-op. Pool*, 199 Okl. 224, 184 P. 2d 790.

The most which plaintiff can possibly be said to have proved under the most liberal construction of her evidence, is a suspicion or inference of fraud. Accordingly, she has failed to establish her case by clear and convincing evidence.

Nor does it appear here that the statements

made as to ownership were such representations as to dissuade the plaintiff from making independent investigation in line with her belief that her father had an interest in the LaPoint property. *Adamson v. Brockbank*, 112 Utah 52, 185 P. 2d 264.

Not only did she fail utterly to prove fraud by clear and convincing evidence, but she failed to establish any of the allegations of her complaint by evidence which would be sufficient to meet even the burden of preponderance.

To the contrary, the record clearly establishes that the father and two sons worked as partners for a great many years (Tr. 104, 105, 171); that the sons did not marry until late in life (Tr. 106), and that consequently all their efforts and resources were directed into the partnership. That the LaPoint property was acquired for the sons, was intended for the sons (Tr. 114), and was actually channelled to the sons during the lifetime of the father and with the full knowledge of all members of the family (Tr. 135, 168, 170, Ex. F); that some 30 years later, after the boys had worked and struggled to pay for the property, and to build it into something, and after they had paid each of the girls \$3,000 and supported the entire family a good part of the time, (130, 179, 117) the court without the plaintiff bringing forward one shred of evidence to sustain her position, relied



upon hearsay and rumor and inference based apparently upon suspicion, to adjudicate the title to the property in a manner other than that which the record has revealed for many years, and cast doubt upon the probate proceedings.

This record does not sustain the trial court, and defendants' motion for nonsuit should have been granted.

#### FINDING NO. 9

Finding No. 9 is to the effect that the property and assignments to the LaPoint property were owned and possessed by Virtus McConkie at the time of his death. For the reasons heretofore discussed, this finding is not supported by the evidence. To the contrary, the only evidence in the record is to the effect that the property had been transferred to J. Archie McConkie during the father's lifetime.

Marie McConkie testified that the title was in Archie at the time of her father's death and that she had heard conversations in her father's lifetime to the effect that the LaPoint property had been fixed to Archie (Tr. 168, 184).

William McConkie testified to like effect, as did also Archie (Tr. 135, 247). While William and

Archie may be held to closer scrutiny, as should be the plaintiff, because of their interest, it is likewise abundantly clear that Marie's testimony is entitled to great weight since it is all against her interests. She stood to gain equally with the plaintiff in an attack upon the Defendants. However, she not only refused to join in such attack because she knew it to be unfounded and unwarranted, but also told plaintiff she should be ashamed of herself for making such an attack which was without merit (Tr. 191). A reading of her testimony will show the frank candid manner in which she testified even though it was against her interests to do so. The evidence in the record is such that it does not support Finding No. 9.

### FINDING NO. 10

Finding No. 10 illustrates very graphically the error into which the court fell in this case. This finding is to the effect that Archie with William's aid and encouragement fraudulently changed the name on the assignments as a part of a fraudulent scheme. There is, however, absolutely no evidence to support such a finding, and all the evidence is to the contrary. Marie's testimony, William's testimony, Archie's testimony, as well as Exhibit F, which plaintiff introduced, being a part of the answer of J. Archie McConkie in a previous case, all reveal that

the changes were made in the lifetime of Virtus F. McConkie and with his knowledge and consent, and in fact that he was the moving party therein.

#### FINDING NO. 11

Finding No. 11 that these defendants stated that they were the owners of the land and the plaintiff and the other daughters of deceased believed these statements and relied thereon, and that the statements were false and fraudulent and made with the intent to deceive the plaintiff and the other heirs of the estate of Virtus F. McConkie is unique in several respects. Plaintiff testified that she knew that the boys had an interest in the LaPoint property (Tr. 34) thus she could not have been deceived in any event except as perhaps to the extent of that interest.

Marie not only believed the statements of the boys as to their ownership, of the property, but testified that she knew all about the transaction by which the property was obtained and knew it was in Archie's name and had been fixed to the boys during the life of her father. (Tr. 164, 165, 168, 184) In view of the factual basis upon which her belief was firmly established, finding No. 11 to the effect that she, along with the plaintiff was induced to believe some false statements of the boys that they owned

the property is little short of amazing. She testified to the basis for her knowledge that the property belonged to the boys, yet the court says to her in effect: "You had no such knowledge. You along with your sister Pearl, the plaintiff in this action, were deceived by these boys," which is exactly opposite to her testimony in this case. If anyone was deceived, it clearly was not Marie, who knew from her mother and father that the LaPoint property belonged to the boys.

The mother, another heir, surely could not have been deceived, since it was she who initially made the statement that the property in LaPoint belonged to the boys, and this, even according to the plaintiff's own testimony. (Tr. 8,22)

It was the mother who assumed the burden, as administratrix, of determining the estate, and its contents. It was she who made whatever representations were made in this regard, and the boys merely joint in these statements. Thus, even assuming evidence (which is entirely nonexistent) that the boys mislead plaintiff by these statements, still, the prime actor in the alleged fraud must necessarily have been the mother. Yet, nowhere does plaintiff accuse her mother of deceiving her by the statements. Thus we have the unique situation of the court finding that one of the persons who partici-

pated in the statements to the daughter which allegedly mislead her, is also found by the court to have been mislead, and one of the daughters who testified that she was not mislead by the statements because she had independent information that the statements were correct, also becoming the defrauded parties along with the plaintiff.

#### FINDING NO. 12

Finding No. 12 is to the effect that the plaintiff, until April 9, 1949 believed the property belonged to the boys and only after that date made a discovery to the contrary and that the assignments had been fraudulently altered.

Plaintiff did testify that it was in 1949 that she discovered that the assignments were altered, and that prior to that, she believed the property to have been owned by her brothers. However, this testimony so conflicts with her other testimony and the facts as they exist, that it is obvious that this finding cannot be sustained.

Plaintiff says that she knew her folks had an interest in the LaPoint property prior to the time they met in O'Donnell's office, although she claims to have known nothing as to the details, (Tr. 30) and that she thought the LaPoint property was in her father's name (Tr. 38).

She lived next door to her parents during her father's lifetime and lived with her mother, sisters and brothers after her divorce, as a member of the family (Tr. 25). Her sister, living under the same circumstances was aware of the transactions and knew all that was going on and knew that in the father's lifetime he had arranged for the land to go to Archie and William (Tr. 164, 165, 168, 184).

If plaintiff knew as she says she did that her folks had an interest in the land and yet that interest didn't appear in the properties specifically described in the probate, surely this was reason to put her on notice that she should make inquiry, and she would be bound by what she discovered or should have discovered. Of this more will be said under Point IV.

The point advanced at this time is that the evidence is clear that she knew what the whole situation was, that she knew the LaPoint property belonged to the boys and could not have been deaf and blind to these very apparent facts and that this is the reason that she let the matter lie dormant for 30 years. Observe, also, that the plaintiff in order to fix a conversation which she had with her sister Marie with respect to the LaPoint property tied that conversation to a registered letter which she had written to Archie in February of 1947, (Tr. 206) and which involved a claim as to the LaPoint property. She also testified that she had a conversation with Wilf

McConkie (the uncle) when certain information pertaining to the property was revealed to her, and that this was in the Spring of 1948 (Tr. 15, 65). In seeking to explain certain statements she had made in her deposition which indicated that she knew that her father had turned in certain land and certain cattle on the LaPoint property, she qualified her statements by saying that she learned these facts in 1949. (Tr. 35, 36). Also in evidence is paragraph 11 of plaintiff's complaint in a previous suit in which she alleged: "That the said lands or equities thereon of said Virtus F. McConkie, deceased, were never included in the probate for the purpose of escaping inheritance tax due the State of Utah, and that it had been agreed by oral agreement between the heirs that the lands would be divided equally between the heirs of the decedent, Virtus F. McConkie, as provided by law."

Under these circumstances, it is respectfully submitted, that Finding No. 12 cannot be supported under the evidence.

### FINDING NO. 13

Finding No. 13 is perhaps not detrimental to the defendants except that it repeats the unfounded charges of forgery, but has exactly nothing in the record to support it. Whether the State of Utah may

or may not have detected alteration does not appear from this record, and certainly it does definitely appear that there were other alterations of the assignments than the ones here involved.

#### FINDING NO. 15

Finding No. 15 represents a culmination of the other findings hereinabove discussed in that it finds that the plaintiff and other heirs are owners of the LaPoint property and are entitled to an accounting.

This finding has equally little support in the record. The only evidence in the record is, as has been repeated heretofore, that the property was fixed to the boys in the father's lifetime at his request and in his presence; that it had been purchased for this purpose, and that all of the interested parties were aware of the fact at all times prior to the father's death.

The finding is also subject to the defect that it appears to be a collateral attempt at adjudication of a title to property which passed under the Decree of Distribution as will more fully appear under point VI herein.

The trial of the case was commenced November 13, 1950. On November 15, 1950 the court took un-



der advisement the defendants' motion for nonsuit. On January 4, 1951 the Court concluded that there was sufficient to make out a prima facie case. Trial was resumed June 4, 1951, and the court rendered a Memorandum Decision July 20, 1951 and the findings were filed in December of 1951. Thus, a considerable time intervened in the trial of the case. Sufficient time, in fact, that the evidence or lack thereof may have become confused by the court with the allegations of the complaint which is much more comprehensive than was the proof which the plaintiff offered.

Whatever the reason for the erroneous findings, however, the defendants earnestly submit that the evidence fails to sustain the findings of the trial court, and that for this reason the case should be reversed.

\* \* \* \* \*

## **Findings on Defendants' First, Second and Third Defenses**

### **FINDING NO. 3, DEFENDANTS' FIRST DEFENSE**

In this finding the court finds that plaintiff was not barred by the Statute of Limitations. The evidence on this matter is treated separately at Point IV.

**FINDING NO. 1, DEFENDANTS' SECOND DEFENSE**

This is a finding against ownership by J. Archie McConkie, and the evidence supporting this ownership is fully developed in the discussed under Findings No. 9, 10, 11, 12, and 15.

**FINDING NO. 3, DEFENDANTS' THIRD DEFENSE**

This findings is to the effect that the sisters agreed to accept \$2,000 each in settlement of their distribution share of the father's estate as it was listed and specifically described in the probate proceedings. The court apparently proceeds in this finding upon the theory that the estate was distributed to the mother and the assignments of the childrens' interests to the mother pursuant to the agreement that the boys were to take over the property. Such a theory cannot be sustained under the evidence.

The only evidence with respect to the agreement on the part of the boys to take over the property and pay the girls \$2,000 each is to the effect that quite some time after the estate had been closed and the property distributed, to the mother, she made the proposition to the boys that if they would pay the girls \$2,000 each and would take care of her in her lifetime, then she would convey her estate to them. Even the plaintiff with all her claims, did not offer any testimony which would in any way indicate that

these parties had made an agreement before the assignment to their mother, that the boys were to take over the property. Her testimony was that the mother had agreed to take the property and divide it, and that she asked her mother for the money and was informed that the boys would have to pay her. (Tr. 44). It is obvious, therefore that there was no agreement amongst the family members prior to the decree of distribution in probate, that the boys would take over the property and pay the girls therefore, yet this finding along with the others seems to tie the agreement to the specific property and specific transaction.

#### **FINDING NO. 4, DEFENDANTS' THIRD DEFENSE**

This finding is to the effect that plaintiff and her sisters relied upon the representations that defendants' owned the LaPoint property and signed the release in reliance thereon and also that the \$2,000 paid to each of the girls was only as to the property listed specifically in the inventory and appraisal, or in other words, the Maeser property.

As pointed out in the discussion under Finding No. 9 and 11, Marie testified that she did not rely upon such representations, because she had independent knowledge that the facts were as stated at that time. Thus, this finding is not sustainable in

this respect, and as pointed out above with reference to Finding No. 3, Defendants' Third Defense, the \$2,000 had nothing to do with the assignments to the mother, but was an independent transaction which arose after the termination of the probate.

It is respectfully submitted that the Findings on Defendants' First, Second and Third Defense are not sustained by the evidence.

### **Point III**

**Under Plaintiff's own evidence she would not be entitled to the award which the court made, because J. Archie McConkie and William H. McConkie clearly had an interest in the LaPoint property during the lifetime of the father.**

Plaintiff admitted knowledge that Archie and William had an interest in the LaPoint property (Tr. 34). Having admitted knowledge of such an interest, the question then is what was the extent of that interest. In this we look to the evidence which establishes that for many years prior to the father's death, he and his two sons, Archie and William had been partners in the ranching and cattle raising business. (Tr. 104, 105, 171). This evidence stands completely uncontradicted, and undisputed and the Court was not at liberty to disregard it. *Parker v. Weber County Irr. Dist.*, 68 Utah 472, 251

P. 11; *Harness v. Ind. Comm.*, 81 Utah 276, 17 P. 2d 277; *Hynes v. White* 47 Cal. app. 549, 190 P. 838; 20 Am. Jur. 1030 Evidence Section 1180. Therefore, in any event, they had at least partnership interests in the property, and the court erred in failing to determine the extent of the partnership interest, or in excluding the partnership interest from the duty to account, and erred in finding contrary to plaintiff's own evidence, that the boys had no interest in the property except as heirs.

\* \* \* \* \*

Defendants feel that the evidence fails to sustain plaintiff in making out a prima facie case of fraudulent misrepresentations to her and the other heirs, and that accordingly the court erred in not granting defendants' motion for nonsuit; that the court erred in its findings in the respects heretofore noted, in that the evidence does not sustain such findings. However, it appears to defendants that even assuming that the court was correct in determining that the father owned or had an interest or equity in the LaPoint property at the time of his death, that still the plaintiff is not and was not entitled to prevail in this action. Accordingly, the following points and arguments assume (for the purpose of argument only) the father's interest in the property.

## Point IV

**Plaintiff's right of action, if one ever existed is barred by the Statute of Limitations.**

Section 104-2-22 (1) U.C.A. 1943 establishes the limitation for an action for the mesne profits of real property to be six years. Section 104-2-24 (3) U.C.A. 1943 fixes the period of limitations for relief from fraud or mistake to be three years from the time of the discovery of the fraud.

The plaintiff very carefully attempted to keep her action from being barred by this latter section, by testimony that she learned nothing of her right of action until just prior to the commencement of her action. However, the principle is well established that whatever is notice to excite attention, and put a party on his guard and call for inquiry, is notice of everything to which such inquiry would have lead. The Statute of Limitations begins to run from the discovery of the fraud or discovery of such facts as would put a person of ordinary intelligence on notice. *Gibson v. Jensen*, 48 Utah 244, 158 P. 426; *Larson v. Utah Light & Traction Co.*, 23 Utah 457, 65 P. 208; *Commercial Bank of Spanish Fork v. Spanish Fork South Irrigation Co.*, 107 Utah 279, 153 P. 2d 547.

The plaintiff's testimony in this case shows that

she was concerned about the property, and asked about it having a question in her mind concerning it at the time of the meeting in O'Donnell's office. (Tr. 30). She knew of the existence of the property, (Tr. 30) she knew her folks had an interest in it, (Tr. 30), and she thought it was in her father's name (Tr. 38). She lived with the defendants and her mother and sisters for a considerable period of time from 1920 to 1924 (Tr. 25), and could scarcely have been unaware of the conversations and discussions which took place concerning the property. Whatever investigation she made in 1949, which revealed, according to her theory (although not according to the evidence), that her father owned the property, would have been as easily discoverable at that time.

It does not appear that she troubled herself to make any further inquiry of the mother and the brothers at the time of the meeting in O'Donnell's office, although the perfectly natural thing to do under such circumstances would have been to voice her inquiry as to how come the LaPoint property belonged to the boys when she thought her father had an interest in it, and thought it was in his name. The ideal time to have cleared up these questions would have been prior to signing the assignment, and at a time when any search she might have made

would have been rewarded by immediate answers.

Plaintiff also testified that she knew her father turned some cattle and made some payments on the property in question by turning in land on it (Tr. 35). True, she qualified this statement from her deposition, by explanation that she learned these facts at a later date. However, inquiry at the time the question arose in her mind, would have revealed these facts to her in 1920 if they were true. Her statement from her pleadings in the previous action (Tr. 215), which we have heretofore quoted under point II, indicates a purpose for not including the land in the estate which is inconsistent with lack of knowledge of the interest which her father had in it.

It is submitted that the foregoing evidence establishes that the plaintiff either knew, or in the exercise of her faculties as a person of ordinary intelligence and prudence, she was put on notice by the probate proceedings and should have made inquiry and could have discovered the full facts as she alleges them to be, assuming the existence of such facts and that therefore, she is barred by the Statute of Limitations, many times over.

It is further submitted, that the evidence of Marie McConkie Johnson and Verdin Johnson, two witnesses whose interests were counter to their testi-



mony, standing as it does, is conclusive that Pearl McConkie Perry had full knowledge of the existence of the LaPoint property and the situation surrounding it at least as far back as 1927 and 1946, and further substantiate the fact that Plaintiff is barred by the Statute of Limitations and by Laches from asserting any rights which might exist.

### **Point V**

**Plaintiff waived any interest which she may have had in the LaPoint property by the assignment to her mother, to whom any such interest was distributed by the Decree of Distribution which may not be circumvented by this attack upon it.**

If the father had an interest in the LaPoint property, then it was disposed of in the probate of that Estate by the Decree of Distribution, and passed to the mother Caroline E. McConkie, and this regardless of whether or not a fraud was perpetrated upon the plaintiff whereby such a thing was made possible. This is illustrated as follows:

The children assigned all of their interest in the Estate to their mother. If the LaPoint property was a part of the father's estate, then it was assigned. The "omnibus" clause in the Decree of Distribution then passed title to this property to Caroline E. McConkie, and there can be no question but that this is the exact effect of the Decree of Distribution.

The rule is stated in 4 Bancroft, Probate Practise, 2nd Ed., Sec. 1144, to be that:

“ It is customary to conclude the decree with an “omnibus” clause to guard against omissions and failures in specific description. Under such a clause the whole of the residue, whether described or undescribed, known or unknown, may be distributed. . . .”

In *Smith v. Biscailuz*, 83 Cal. 344, 21 P. 15, certain real property was not mentioned in the probate of the estate other than the fact that the decree of distribution contained an “omnibus” clause. It was held that the decree passed title to the property not mentioned which belonged to the decedent.

Similarly, in the case *In re Bouche's Estate* 24 Cal. App. 2d 86, 74 P. 2d 563, where property was involved which had not been included specifically in the probate decree, but the decree contained an omnibus clause. The trial court in that case upon petition allowed the estate to be re-opened to administer newly discovered assets. On appeal the court held, however, that there was no need to re-open to administer such assets, because they passed under the original decree, and reversed the trial court. Said the court:

“In the case at bar the decree of distribution adequately provided as hereinbefore

noted, for the distribution of "any other property belonging to said estate, whether described herein or not, as well as for the distribution of the rest, residue, and remainder of said estate." This provision vested in the trustees whatever estate the contract in question created. (citing *Humphry v. Protestant, etc., Church* 154 Cal. 170, 97 P. 187; *Victoria Hosp. Ass'n v. All Persons*, 169 Cal. 455, 147 P. 124) . . ."

In *Humphry v. Protestant etc., Church*, 154 Cal. 170, 97 P. 187; and *Victoria Hosp. Ass'n v. All Persons etc.*, 169 Cal. 455, 147 P. 124, the same rule is followed.

Utah has recognized this rule in the recent case of *Jones v. Cook*, (Utah) 223 P. 2d 423: wherein the effect of such an omnibus clause was stated to be:

"The phrase 'any and all other property not now known or discovered which may belong to said estate or in which said estate may have an interest,' covers any property not specifically described which was owned by decedent and not disposed of in the regular course of probate."

Thus, if plaintiff is correct in her assertion that the LaPoint property should have been included in the estate, and if she proves that it was a part of the estate, she also proves that it passed to the mother under the Decree of Distribution.

It follows therefore, that she must make a direct attack upon that decree rather than a collateral attack, and that she must vacate the decree of distribution on the ground of fraud, and that otherwise the decree distributing the property to the mother, is presumptively valid.

Nowhere does the plaintiff charge her mother with having fraudulently failed to include the LaPoint property in the estate whereby she was induced to sign the assignment which had the effect of allowing the property to be conveyed in probate to the mother. Yet, necessarily, this must be charged and proved under any theory upon which the plaintiff might elect to proceed. Mrs. Caroline E. McConkie by all the testimony, including that of the plaintiff told all parties concerned at the time the assignment was made to her that the boys owned the LaPoint property. This being so, plaintiff must charge and prove that the mother defrauded her of her rights, if, as she insists, the father had some interest in the LaPoint property at the time of his death.

However, at no point does she make such an accusation against her mother to whom the property passed if it was a part of the estate. Her complaint is that the boys got the property which is a part of the estate. If it was a part of the estate, then the

boys acquired it from the mother by her deed to them, and again the plaintiff must charge that the mother obtained the property from her by fraud. In this she would be in the unique position of being the only heir who would claim her mother perpetrated a fraud, with her sister who would have equally as much to gain by such an accusation maintaining stoutly that there was absolutely no fraud involved.

### Point VI

**Plaintiff's suit is a collateral attack upon the Decree of Distribution in the Probate of the Estate of Virtus F. McConkie, which may not be maintained against these defendants.**

1 Bancroft Probate Practice, 2nd Ed. Sec. 81, 282, 130 P. 217, wherein it was stated:

“The general rule is now well established that a judgment, order, or decree of a probate court . . . is equally as immune from collateral attack as is the judgment of any other court whatsoever, acting within the scope of its state the rule to be:

That a decree may not be attack collaterally is established in Utah by the case *In re Evans*, 42 Utah jurisdiction. . .”

“The law is well settled that a decree of distribution in probate proceedings, after due and legal notice, by a court having jurisdiction

of the subject matter is conclusive as to the fund, items, and matters covered by and properly included within the decree until set aside or modified by the court entering the decree in the manner prescribed by law, or until reversed on appeal."

That the attack in this case is collateral is clearly established by *Intermill v. Nash*, 94 Utah 271, 75 P. 2d 157. In that case, this court held that a "direct attack" was an attempt to correct or avoid the judgment in some manner provided by law. That it is an attack by appropriate proceedings between the parties thereto, seeking to have the judgment annulled, reversed, vacated, or declared void. Conversely, when the direct purpose and aim of the proceeding is to attain relief other than setting aside or modifying the judgment and the attack upon the judgment is merely incidental, then the attack is collateral.

Tested by these standards, it is obvious that the attack in this case is collateral. The avowed purpose of the suit was to require the defendants to hold the property in trust for the heirs of Virtus F. McConkie, and for an accounting.

It is obvious that the paramount purpose here was not to vacate the decree for cause, since the plaintiff did not, in her pleadings at any point charge the administratrix with having defrauded her. Yet, this

would have been absolutely essential to a suit to vacate the decree, since the misrepresentation was one made by the administratrix, the Decree of Distribution passed the property to the Administratrix, and anything which she may have elected to do with the property thereafter was something which she should be held accountable for.

Thus, if plaintiff's proof is correct, then her mode of procedure is wrong, and she is proceeding against the wrong parties.

So long as the decree in probate stands, it is the rights of the parties, which means that the plaintiff has no interest in any of her father's estate, she having assigned her interests, and the Decree of Distribution having distributed that estate to her mother. She has not vacated the decree, and is bound by it.

This property, if it was a part of the father's estate, passed to the mother under the probate. She, and she alone was answerable to the plaintiff for any misrepresentation, because it was she who received the property by virtue of the claimed misrepresentation. It is respectfully submitted, that the trial court had no authority whatsoever, under the circumstances to find against the defendants and require them to account, and that the decree in probate standing as it does, precludes such a proceeding as here

brought and adjudicated by the trial court. The adjudication in this case constitutes an impeachment of, and contradiction of the decree of Distribution yet that decree stands unvacated.

\* \* \* \* \*

### CONCLUSION

The Defendants respectfully submit that the trial court committed the following fundamental errors in the trial and disposition of this case.

1. The trial should have granted defendants' motion for dismissal or nonsuit because plaintiff failed to establish a prima facie case.

2. The great preponderance of the evidence indicates that the property here involved did not belong to the deceased, and that it did belong to J. Archie McConkie, and that there was and is no fraud involved, and that plaintiff failed to establish her case.

3. That even assuming an interest in the estate, and assuming her right to reach it in these proceedings, the court erred in ruling that the entire LaPoint property was included in the estate, under the evidence that the father, and the two sons were co-partners.



4. That plaintiff is barred by the Statute of Limitations and by laches from asserting her claimed rights.

5. That plaintiff's rights if any she had passed by virtue of the assignment to her mother and the Decree of Distribution.

6. That plaintiff without directly attacking the decree and establishing that she was defrauded by her mother into assigning her property rights to her mother, thus enabling the mother to get a distribution of the property of the estate to her, may not proceed against these defendants in derogation of the Decree of Distribution.

Respectfully submitted,

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