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

Utah Supreme Court

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Clyde S. Johnson; Therald N. Jensen; Attorneys for Respondent;

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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 Apellants

} Case No. 7811

Brief of Respondent

FILED

CLYDE S. JOHNSON and

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THERALD N. JENSEN

Clerk, Supreme Court, Utah

Attorneys for Respondent

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TEXTS CITED

5 Corpus Juris 943, Section 116
 Volume 4, Bancroft's Probate Practice, 2nd Ed., Sec. 1171, p. 485, and Sec. 1176, p. 495
 Cooley in his Law of Torts, 3rd Edition, p. 934

STATUTES CITED

Section 104-2-24 (3) U.C.A. 1943
 Section 102-14-23 U.C.A. 1943

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

Brief of Respondent

Because of the lengthy quotations set forth in appellants' brief from respondent's findings of fact, respondent now prefers to come to grips with appellants' argument rather than to spend time in a preliminary statement. A further narration of the facts will necessarily appear as respondent presents her argument. We desire to correct one error in appellants' preliminary statement, namely that the respondent Pearl McConkie Perry is the only dissatisfied heir of Virtus F. McConkie. This is not true. There were five brothers and sisters in this estate. Two of the brothers

are defendants and one sister is plaintiff. Another sister, Marie, testified on behalf of the defendants and the heirs of the other deceased sister, Leona, are represented by counsel who appear for plaintiff and have joined iwth plaintiff in prosecuting this action although their names do not appear in the cause. The children, therefore, line up two against three. Moreover, as we shall point out later, the sister Marie who testified on behalf of the defendants was far from a disinterested witness or one who stood to benefit by the plaintiff's position as defendants argue. She had already been "taken care of" by a sizeable conveyance at the time of the trial.

I

DID VIRTUS F. McCONKIE OWN THE LaPOINT RANCH AT THE TIME OF HIS DEATH?

Herein we shall meet the arguments of appellants advanced in Points I, II, and III of their brief.

The LaPoint property now claimed by defendants and omitted from the Virtus F. McConkie Estate consisted of three separate parcels of land which were being purchased under contract of sale by one Myron Hacking and one John S. Hacking, both of whom were dead at the time of the trial herein. It is undisputed that Myron Hacking and John S. Hacking by instruments in writing (Plaintiff's Exhibits A, B and C) assigned all of their right, title and interest in and to these three parcels of land to Virtus F. McConkie. The assignments were each consummated on the 29th day of April, 1918. Each of the assignments was executed in the presence of a Notary Public, Herbert Ty-

zack, who was also dead at the time of the trial herein. These facts are all admitted and indeed are clearly apparent from an examination of the said assignments themselves. On the 29th day of April, 1918, therefore, the contract equities in the lands in question were vested in Virtus F. McConkie. Virtus F. McConkie did not die until February 20, 1920. The property described in the assignments was never listed or inventoried in the estate of Virtus F. McConkie, deceased and over 25 years later, namely shortly prior to February 14, 1946, the defendant J. Archie McConkie for the first time presented these assignments to the State Land Board of the State of Utah and patents were issued to him on February 14, 1946. In the meantime the given name of the true assignee "Virtus F." had been removed from each of the instruments by ink eradicator or erasures or both and the given name of the defendant "J. Archie" had been substituted in each of said assignments. J. Percy Goddard, a handwriting expert, testified without contradiction that the several assignments and affidavits had been completely executed and notarized before the obliterations were made. While endeavoring to obliterate the name of his deceased father, the clumsy J. Archie McConkie rubbed out part of the notary seal. The testimony of Mr. Goddard alone is enough to positively establish that these assignments were completed, and therefore the interest of Myron Hacking and John S. Hacking in the land was effectively transferred to Virtus F. McConkie, prior to the time of the alteration of the documents. Respondent need not depend entirely on this testimony, however, because the defendant William H. McConkie himself testified that the alteration was made over a year subsequent to April 29, 1918, namely

in the fall of 1919 (Trans. p. 135). We are not bound by that answer because the question was objectionable and was objected to under the dead man statute and the statute of frauds but defendants are bound by the admission that the alteration was subsequent to April 1918, the date of the execution of the assignments.

In the analysis of this case we are then brought squarely to these propositions: **FIRST**, Title to the LaPoint property was transferred to Virtus F. McConkie, deceased, by an instrument in writing and **SECOND**, there is no instrument or conveyance whatsoever from Virtus F. McConkie to the defendant J. Archie McConkie, the present claimant. Appellants in their brief have made no argument upon this point and have not even hinted as to how J. Archie McConkie claims he obtained the title to this property from his deceased father, Virtus F. McConkie. There is no valid argument which they can make on this point. The dead man statute prevented them from testifying as to any conversation or transaction with their deceased father which would assail his estate, and if they had been able to so testify they fall squarely in the teeth of the **Statute of Frauds, Utah Code Annotated 1943, 33-5-1**, which reads as follows:

No estate or interest in real property, other than leases for a term not exceeding one year, nor any trust or power over or concerning real property or in any manner relating thereto, shall be created, granted, assigned, surrendered or declared otherwise than by act or operation of law, or by deed or conveyance in writing subscribed by the party creating, granting, assigning, surrendering or declaring the same, or by his lawful agent thereunto authorized by writing.

The contracts of sale above mentioned relate to in-

terests in land and Virtus F. McConkie certainly had an equitable interest in the land described in the contracts of sale. The contracts of sale were all but paid out at the time of his death. It would take an instrument in writing signed by him or by his agent thereunto authorized in writing, to transmit that interest to J. Archie McConkie. There is no such writing. The defendants cannot prevail in this law suit. Our position that the interest of Virtus F. McConkie in these contracts of sale is an interest in land within the meaning of the Statute of Frauds is sustained by *Young v. Corless* 56 Utah 564, 191 P. 647 and *McNeil v. McNeil* 61 Utah 141, 211 P. 988. It seems too clear to admit of debate that the change in the name of the assignee in the assignments to these contracts of sale by Archie McConkie would not operate as a conveyance. It follows as an inescapable conclusion that the equitable title to the La-Point land was vested in Virtus F. McConkie at the time of his death and it should have been listed as one of the assets of his estate, and the defendant J. Archie McConkie now holds legal title thereto in trust for the heirs of Virtus F. McConkie, deceased.

This is a case where the conduct and actions of the defendants are most significant and an examination of the altered documents is most revealing and the writers of this brief respectfully request the members of this court to personally examine the exhibits and in particular, Plaintiff's Exhibits A, B and C. The originals thereof which are in the office of the Secretary of State are even more revealing than the photostatic copies which were necessarily substituted therefor at the trial. The badges and earmarks of fraud, deception and dark dealing are strikingly apparent.

It is perfectly clear from an examination of Exhibits A, B and C that Virtus F. McConkie was not present when the alterations occurred. In particular, attention is called to the witness lines at the top of each assignment. The first witness was Herbert Tyzack, who was likewise the notary public. On the second line there appears the surname McConkie. In his effort to remove the name of his deceased father from any connection with the documents the defendant, J. Archie McConkie, by use of ink eradicator removed the given name of Virtus F. McConkie on the witness line but left the surname of McConkie in the handwriting of his deceased father. The assignments would not have been invalidated because of the fact that the name of Virtus F. McConkie appeared on the witness line. The defendant J. Archie McConkie apparently was confused in the execution of his fraudulent scheme and he erased more than he need do and thereby left the surname of his deceased father to testify against him.

Let it also be observed that these land sale contracts were entered into by the State of Utah with the original contracting parties on June 26, 1911, and that at the time of the death of Virtus F. McConkie the contracts were practically paid in full. The last contract payments were made on January 5, 1921, prior to the time the inventory and appraisal was filed in the Virtus F. McConkie estate. If these contracts ever belonged to the defendants they belonged to them on January 5, 1921 and the patents could have been issued at that time.

Why did the defendants secretly hold the contracts of sale until shortly prior to February 14, 1946, a period of twenty-five years?

Plaintiff does not know when, following the death of Virtus F. McConkie, these instruments were altered and mutilated by the defendants but in the long interim Tom O'Donnel, the attorney who probated the estate, Tyzack the notary public who notarized the signatures of Myron and John S. Hacking the assignors of the contracts of sale, and the assignors themselves had died. The defendants purposely waited until death sealed the lips of those who might expose their fraudulent actions. It took them twenty-five years to get up enough courage to take these forged and mutilated instruments to the State Land Board for the issuance of patents.

The said documents which were at last surrendered to the State Land Board of the State of Utah by the unclean and trembling hands of J. Archie McConkie speak against him and position taken by him and his co-conspirator and co-defendant William H. McConkie more loudly and conclusively than any oral or written argument which might be advanced. The trial court was impressed by these documents and we feel certain that the members of the Supreme Court will be equally impressed if they personally examine the same.

II

DID THE ASSIGNMENT BY THE HEIRS IN 1922 AND
THE DECREE OF THE COURT IN 1924 HAVE THE
EFFECT OF DISTRIBUTING THE LaPOINT
PROPERTY WHICH WAS NOT LISTED
OR INVENTORIED IN THE ESTATE?

Herein we meet the argument advanced in Point V in Appellants' Brief.

It seems moot even to argue this proposition. It is true the defendants in their third defense in their answer set forth the estate assignment executed on February 25, 1922 by the McConkie heirs (Defendants' Exhibit 1). The defendants, however, do not claim that title vested in the defendant J. Archie McConkie either directly or indirectly by virtue of defendants' Exhibit 1 but claim that by reason of her executing the said instrument the plaintiff "is estopped from claiming any right or interest in the said property described in her complaint." The position of the defendants at all times throughout the trial and in their argument on the appeal is that title to the LaPoint property is vested in the defendant J. Archie McConkie because of the issuance of patents from the State of Utah to him upon surrender of the assigned contracts of sale. Nowhere in their pleadings do the defendants attempt to deraign title through the so-called estate assignment of February 24, 1922 (Defendants' Exhibit 1) but only assert an estoppel against plaintiff on account thereof. We submit that none of the elements of an estoppel are either pleaded or proved. The defendants are not innocent parties who relied to their detriment upon some representation or conduct on the part of the plaintiff. On the contrary, they are fraudulent conspirators who, either alone or in conjunction with their deceased mother, purposely omitted the listing or inventorying of the LaPoint property and lead plaintiff and the other heirs to believe that the LaPoint property belonged to the defendant and that no part of it belonged to the estate. They are in poor position to urge an estoppel based upon their own fraud.

Again—a review of the documents themselves is more

rewarding than argument. The manner in which the estate was handled spells out what the parties intended. The inventory and appraisement does not list the LaPoint property and the entire listed estate was appraised at the sum of \$15,040.00. Virtus F. McConkie died intestate. One-third of the estate belonged to the surviving wife and the other two-thirds, approximately \$10,000.00 in value, belonged to the five sons and daughters of deceased and accordingly and based upon said specific inventory and listing of the properties of deceased the plaintiff and her sisters agreed to accept from the defendants the sum of \$2,000.00 each in exchange for their interest in the listed estate property. Plaintiff joined with other heirs in executing the estate assignment only upon being assured that the property of deceased was that listed in the estate file. It is true that an omnibus clause contained in the decree of distribution will have the effect of distributing all property of deceased but this is not true if the heirs have been misled and deceived as to what assets belonged to deceased. Such is our case. Fraud vitiates the whole transaction. The defendants are not assignees or grantees in this assignment. The assignment is to the mother. The defendants are not innocent purchasers. They have at all times known about the fraud. The mother may or may not have known about it. The mother is not relying upon the estate assignment. She is not a party to the litigation. Only the perpetrators of the fraud rely on it. They seek to sustain their title by pointing to an instrument which was signed by the plaintiff when she was acting under the influence of the belief which she entertained that the boys and not the father owned this property. This belief was caused by their

concealments and misrepresentations. They seek to take advantage of their own wrongs. This neither law nor equity will sanction.

The assignment could not operate as a conveyance aside from the question of fraud. The paramount object in the construction of a deed, and the rule for the same in the construction of an assignment (5 *Corpus Juris* 943, Section 116)), is to give effect to the intention of the parties to it. Such intention is to be gathered from a consideration of the entire instrument written in the light of circumstances under which it was executed. See: *Wise v. Watts*, 9 Cir., 239 P. 207, 218, 152 C.C.A. 195, certiorari denied 244 U. S. 661, 37 S. Ct. 745, 61 L. Ed. 1376. When the members of the McConkie family executed the assignment transferring their respective interests in the property of which their father died seized and possessed to their mother, all parties to the conveyance except the two brothers, defendants in this action, and probably the mother were thinking about the real estate and personal property which the administratrix had returned to the court as being property of the estate. At that time discussion was had with respect to the LaPoint property. The defendants and the mother stated that the LaPoint property belonged to the defendants (Tr. p. 139). The assignment was made broad enough to cover all of the property of deceased then known and which is described in the inventory and appraisement as well as any other property which was **not then known to them** and which he owned or in which he had any interest. But it is so clear as almost to be self-evident that they did not intend the assignment to include the LaPoint property

now in litigation because they definitely had such property in mind and considered that their father had no interest in it. Since none of the heirs considered the LaPoint property to be affected by the estate assignment surely the court will not now find and hold to the contrary. The only reason plaintiff agreed to receive and did receive \$2,000.00 as her share of the estate was because there was \$10,000.00 worth of property to be divided among five sons and daughters and one-fifth thereof equaled \$2,000.00.

The decree of distribution in the McConkie estate is no better than the assignment upon which it rests. The assignment is merged in the decree. **Hopkins v. White**, 20 Calif. 234, 128 P. 780. Whatsoever title was conveyed by plaintiff to her mother by the assignment was confirmed in the mother by the decree. But no more. Since the assignment is merged in the decree the latter is evidence of nothing that is not evidenced by the former and the latter is open to the same construction as the former and is also subject to the same infirmities. Since the assignment is vitiated by fraud the decree is likewise so vitiated. The general principles applicable to the construction of judgments are applied in construing an order or decree of distribution. Judgments must be construed as a whole. In case of ambiguity or doubt the entire record may be examined or considered, **Snow v. West**, 37 Utah 528, 110 P. 52. Since the court may examine the entire record to determine the meaning of the decree of distribution it may look to the assignment which is the basis of the decree and in so looking it will see that the LaPoint property is not included.

III

IS PLAINTIFF BARRED FROM RECOVERY HEREIN
BECAUSE OF THE STATUTE OF LIMITATIONS
OR LACHES?

Defendants contend that plaintiff knew or should have known of her father's claim or interest in the LaPoint property at the time the estate was being probated and therefore her right to recovery is barred by the Statute of Limitations. The Statute of Limitations which was then applicable to our action was that of **Utah Code Annotated 1943, 104-2-24 (3)**. The three-year statute of limitations governs fraud cases. In 1947 the plaintiff first heard something was irregular; she actually learned of the fraud in April, 1949, and started her action in November 1949.

Defendants say plaintiff must have known her father owned the LaPoint property because it is set forth in her complaint in the earlier action that the property was purposely omitted from the estate by agreement of the heirs to save expenses. Plaintiff denies there was any such agreement. (Tr. p. 214-217). Defendants do not claim there was any such agreement among the heirs. All parties agree there was no such understanding. It is, therefore, idle to spend time arguing this contention.

Defendants, however, say that we should have mistrusted them and their mother, should not have believed the representations made by all three, but should have conducted an independent investigation and commenced an action when the estate was in probate. Let us look at the situation which prevailed. The defendants were grown men and were both unmarried and immediately following their father's death they, along with their mother, took over the

handling of the affairs. On the other hand the plaintiff at that time was divorced and had several small children. She relied implicitly in the representations and good faith of her brothers and her mother. Her mother was appointed administratrix but the actual handling of the property and affairs was more or less left to the defendants (Tr. p. 136). The defendant J. Archie McConkie testified moreover that a partnership relation existed between him, his co-defendant and their mother from the time of their father's death until the year 1937 (Tr. p. 246). The defendant William H. McConkie stated that he and his brother assisted their mother in handling the affairs of their father after his death (Tr. p. 105). The defendants lived with their mother at all times following their father's death in the year 1920 to the year 1937 (Tr. p. 106, 161). In the several conferences which lead up to the execution of the assignment in the estate (Defendants' Exhibit 1) the mother stated to the heirs which property belonged to deceased and which property belonged to the boys (Tr. p. 116) and when the mother made the statements the defendants didn't say anything to the contrary (Tr. p. 139). The mother stated that the La-Point property had been bought for the boys (Tr. p. 147). That language in itself is significant. She didn't say the boys bought it—she said it **had been bought for the boys.**

Was the plaintiff, who at this time was burdened with the problem of supporting herself and her minor children, unreasonable in relying upon the representations made by her own mother and by her elder brothers who were looking after the affairs of the estate? We say she was not unreasonable and that there was nothing to excite her attention until word leaked out that the patents had finally been

issued. On the contrary, there was a relationship of trust and confidence between plaintiff and her mother and her brothers. There was not only a blood relationship but the mother with the active management of the brothers was administering the estate as a fiduciary. Plaintiff believed them and relied upon them (Tr. p. 32 et passim). Had she gone to the records at the County Court House or at the State Capitol she would have found no instruments which would have indicated that her father was the owner of the LaPoint land. The equity in the land was not being taxed in 1920, 1921 or 1922 (Tr. p. 83). The contracts of sale at the State Capitol stood in the names of John S. and Myron Hacking. The brothers had worked on the LaPoint land with their father, and when the administratrix who was also her mother told the plaintiff the land belonged to the boys the plaintiff acted reasonably in believing that it did belong to the boys and not to her father. As defendants argue in their brief plaintiff believed the defendants owned the LaPoint property.

There is a conflict in the testimony between the plaintiff on the one hand and her sister, Marie Johnson, and the latter's husband, Virden R. Johnson, on the other hand. Defendants in their brief place great stress upon the testimony from the "disinterested witness," Marie Johnson. She was such a willing witness that it required the combined efforts of the court, opposing counsel and her own attorneys to restrain her enthusiasm at the trial (Tr. bottom half of p. 185 and top half of p. 186). Marie Johnson, however, after the pot began to boil in 1947, received a deed to a valuable piece of property from the mother. This deed was executed July 19, 1948 (Tr. p. 251). It was the co-defendants who

actually paid the money to construct the home situated on this property. They expended for the improvements alone the sum of \$3,800.00 (Tr. p. 143). Marie Johnson and her husband, Virden R. Johnson, had been rewarded by the conveyance to them of this improved land, and it is against this background that the interest and testimony of Marie and Virden R. Johnson was evaluated by the trial court and must be evaluated upon appeal.

It is little wonder that the trial court was not impressed by the vacillating testimony of the defendant J. Archie McConkie. See the transcript at page 246:

Q. (By Mr. Jensen) Following your father's death state whether or not you and your brother Will and your mother operated as co-partners?

A. We did, we worked together.

Q. And you continued to work as co-partners, the three of you, until your mother's death, did you?

A. No sir, until '37 about.

Q. Did you have the LaPoint property included in that partnership?

A. Yes, we had that along too.

Q. That was right within the partnership, was it?

A. No, no.

Q. What was your answer, yes or no?

A. No sir, that wasn't exactly along with the rest of the stuff.

Q. Wasn't exactly?

A. No, it wasn't partnership along with all of it.

Q. You claimed that as your own, did you?

A. Well,—

Q. Answer that yes or no.

A. Well, it would be yes and no. Will had an interest in it too.

This defendant's attorney only risked four questions with him upon direct examination (Tr. p. 238).

The conflict in testimony was resolved in favor of the plaintiff. The trial court heard and saw the witnesses, observed their demeanor and believed one against several. Its decision in so doing should not be disturbed.

IV

IS PLAINTIFF'S ACTION IN EQUITY MAINTAINABLE WITHOUT REOPENING THE VIRTUS F. McCONKIE ESTATE?

Herein we meet Point VI of Defendants Brief.

At the outset we point out that the want of legal capacity to sue is waived unless it is attacked by the answer or under the old rules by demurrer or answer. *Chamberlain et al v. Larsen et al* (Utah) 29 P. 2d 355; *Tooele Meat & Storage Co. v. Fite Candy Co.*, 57 Utah 1, 116 P. 427. So it is with waiver of nonjoinder or misjoinder: *Sidney Stevens Implement Co. v. South Ogden Land, Building & Improvement Co.*, 20 Utah 267, 58 P. 843, also *Salt Lake City v. Salt Lake Investment Co.*, 43 Utah 181, 134 P. 603. Neither by demurrer or answer have the defendants raised any question with respect to the form of this action. Capacity to sue must be raised by the pleadings, otherwise it is waived:

“Moreover, no objection was made at the proper time and in the proper manner to plaintiff's ca-

capacity to sue either by a demurrer or answer and therefore if there had been any merit to this contention it was waived." *Cobb v. Hartenstein*, 47 Utah 174, 152 P. 424.

In the case now before the court the probate proceedings were conducted from 1920 to June 2, 1924, when the administratrix was discharged. Notice to creditors was given and all creditors paid. To reopen the estate would not only have been a useless ceremony but also a diminishing one inasmuch as by the reappointment of an administrator a needless expense would have been entailed. The only question is where rests the title to the property. The court had full power and jurisdiction to enter its decree thereon.

Defendants contend that 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; and they cite *Intermill v. Nash*, 94 Utah 271, 75 Pac. 2d 157, to support their theory that the attack of the plaintiff in the instant case is collateral. However, the case of *Intermill v. Nash*, supra, recognizes the requirement that the res must be before the court in order that the judgment import verity, prove itself, and be invulnerable to attack by any indirect assaults. In the instant case, the res was not before the court in the probate of the Estate of Virtus F. McConkie, but rather was deliberately and fraudulently concealed from the court.

A decree of distribution does not constitute a bar to an equitable action based upon fraud. See *In re Madsen's Estate*, 87 Pac. 2d 903:

"It is * * * well settled that where, through extrinsic fraud practiced in probate proceedings,

distributees have obtained property to which they were not entitled, equity will do justice not by overthrowing the decree of distribution but by declaring the distributees hold the property in trust for the rightful owners. * * * This character of relief is very common in the matter of fraudulent probate proceedings. The order or decree from the effect of which relief is sought cannot constitute a bar to such equitable action. As has been said, it is solely because of the order or decree, collaterally unassailable and valid on its face, that the equitable jurisdiction is necessary and exists."

In the case of *Simonton et al v. Los Angeles Trust & Savings Bank, et al*, 221 Pac. 368, an executrix fraudulently and designedly concealed certain shares of stock from the notice, attention and consideration of the probate court, and the same was not mentioned, reported or accounted for by the executrix. Suit was brought by one of the heirs who had no knowledge of the existence of said property, and the question of intrinsic and extrinsic fraud was raised. Syl. 1 concisely states the ruling of the court:

"The fraudulent concealment, by a testator's widow, of the common property, from the attention of the probate court in the administration of testator's estate, was extrinsic fraud, and a court of equity has jurisdiction to interpose and furnish appropriate relief from the final decree of distribution obtained by the employment of that fraud."

It is apparently the further contention of the defendants that plaintiff's mode of procedure is wrong, and that she should have proceeded to endeavor to vacate the Decree of Distribution in the Estate of Virtus F. McConkie.

The probate court is without power to reopen or vacate its decree of distribution after expiration of the time to ap-

peal. After six months has elapsed from the filing of a decree, the court is without jurisdiction, and hence powerless to interfere with the decree; and the decree can be assailed only in an independent equitable action, and for proper cause such as prompted the instant action. Vol. 4 **Bancroft's Probate Practice** 2d Ed., Sec. 1171, p. 485; and Sec. 1176, p. 495. And see: **Noyes et al v. Agee**, 53 Utah 360, 178 Pac. 753.

A person defrauded by the acts of an executor or administrator is not without means to correct the injustice. Section 102-14-23, U.C.A. 1943, sets out a remedy to the person so injured:

Mistakes in settlement may be corrected at any time before final settlement and discharge, and after that time by an action in equity, on such showing as will justify the interference of the court."

And see: **In Re Rice's Estate. Rice v. Rice et al**, 111 Utah 428, 182 Pac. 2d 111, quoting Cooley in his **Law of Torts**, 3rd Edition, p. 934, on the subject of "Wrongs by Deception," as follows:

" * * * It can never be either wise or safe to mark out specific boundaries within which deceits shall be dealt with, but beyond which they shall have impunity; but each case must be considered on its own facts, and every case will have peculiarities of its own, by which it may be judged."

Judged by the evidence in the instant action, the Plaintiff has been deceived and defrauded to her prejudice, and a grave injustice would be perpetrated if after establishing that fact she was yet denied relief.

ARGUMENT
ON
PLAINTIFF'S CROSS APPEAL

Plaintiff has cross appealed from the lower court's finding and decision that the plaintiff failed in her proof that Virtus F. McConkie at the time of his death was the owner of 300 shares of the capital stock of the Whiterocks Irrigation Company. We believe the evidence is such that the lower court should also have impressed a trust upon this water stock in the hands of the defendant J. Archie McConkie. The 300 shares of stock in question represented the water which was used for irrigation of the LaPoint property. It is hardly to be expected this water would be owned by one person and the land by another and all of the evidence adduced at the trial points to the fact that Virtus F. McConkie was also the owner of the said shares of stock.

The secretary of the Whiterocks Irrigation Company, Mrs. Woolley, was called as a witness, and she produced the minute book as well as certain other records of the company. From these it is definitely established that Virtus F. McConkie was an officer and director of the Whiterocks Irrigation Company shortly prior to his death on February 20, 1920. He was nominated and elected a director at the annual stockholders' meeting of December 13, 1919 (Tr. p. 72). It was stipulated at the trial that a person must be a stockholder in order to be a director in said company (Tr. p. 79). It also appears that as late as 1924 the assessment records of the Whiterocks Irrigation Company disclosed that said 300 shares of stock were listed and assessed

against Virtus F. McConkie. The names of J. Archie McConkie and William H. McConkie were not listed in connection with this 300 shares of stock and the records clearly disclose that the stock was being listed and treated as the property of Virtus F. McConkie.

Certificate No. 12 in the Whiterocks Irrigation Company which was originally issued to John S. Hacking was never presented for reissuance in the name of Virtus F. McConkie, and it was not until the month of December 1944 that Archie McConkie secured affidavits as to the loss of this certificate and presented them to the Whiterocks Irrigation Company. Again we request the members of the court to carefully examine the affidavit signed by John S. Hacking (Plaintiff's Exhibit D). As this affidavit was first prepared by Archie McConkie it read that John S. Hacking in the year 1915 sold to Archie McConkie 300 shares of the capital stock of the Whiterocks Irrigation Company. Apparently the old man John S. Hacking refused to execute such an affidavit which had been presented to him and the same was partly erased and written over so that it now correctly reads that in the year 1915 John S. Hacking sold to V. F. McConkie (also known as Virtus F. McConkie) said 300 shares. The conclusive evidence therefore in the files of the Whiterocks Irrigation Company is the affidavit of John S. Hacking presented to said company by the defendant J. Archie McConkie to the effect that this 300 shares of water stock had been sold by John S. Hacking to Virtus F. McConkie and not to J. Archie McConkie (Archie).

It is also significant that it was not until the year 1944, shortly prior to the time the altered and mutilated real estate assignments were presented to the State Land

Board, that J. Archie McConkie went to the Whiterocks Irrigation Company to have a certificate issued in the place of one which had been lost or destroyed. If this stock at all times since 1915 belonged to J. Archie McConkie, as he recites in his own affidavit (Plaintiff's Exhibit E), would not J. Archie McConkie have presented the certificate to the irrigation company, or if he could not find it would he not have then and there filed affidavits as to loss and had the certificate issued in his own name? He sat by as the stock assessments on these 300 shares came out in the name of his father. They were so issued, for example, in the year 1924 (Tr. p. 75).

The fraud is all woven out of the same piece of yarn. Both the land and the water belonged to the deceased father, and the conspiring sons sat by for approximately twenty-five years before they presented the altered real estate assignments and the fraudulent affidavit executed by J. Archie McConkie for the transfer of the water. The corrected affidavit of John S. Hacking, who was also dead by trial time, as to the ownership of the said water is the best evidence in the record on this particular subject. Virtus F. McConkie owned this water stock. On the strength of it he was elected as a director in the Whiterocks Irrigation Company. The same was assessed in his name and remained on the assessment rolls in his name for almost twenty-five years. Unfortunately, at the time of the trial the notary on plaintiff's Exhibit D, Wallace Calder, was also dead. He died in 1945 (Tr. p. 88).

Why did the two McConkie brothers at about the time the lawsuit was started become apprehensive as to what the records of the Whiterocks Irrigation Company might dis-

close? The only purpose they would have in visiting the secretary and reading the minutes would be to learn if there was anything revealed therein which might be adverse to their position (Tr. p. 73). Mr. Perry, the husband of the plaintiff, also examined these records before and after they were checked by the defendants, and at the second examination it was discovered that some of the pages from the record books had been torn out and in particular a set of minutes which referred to the election of Virtus F. McConkie to the Board of Directors of the Whiterocks Irrigation Company (Tr. p. 87). Although the record is not positive on this point, we believe the defendants tore out these pages to further bolster their fraudulent position that the water stock belonged to them and not to their father.

Neither of the defendants made any pretext of explaining how J. Archie McConkie acquired the stock in the Whiterocks Irrigation Company notwithstanding the fact that the affidavit of John S. Hacking recited that the stock had been sold to the father, Virtus F. McConkie. In light of this silence of the defendants, and upon a fair consideration of all of the documentary evidence pertaining to the ownership of the 300 shares of stock in the Whiterocks Irrigation Company, we submit that the lower court should also have impressed a trust upon this water stock in the hands of the defrauding sons and that this court should now reverse the decision of the lower court to that extent.

CONCLUSIONS

From the foregoing it is to be concluded:

1. At the time of the death of Virtus F. McConkie there was vested in him the equitable title to what has been

referred to herein as the LaPoint property, and the same should have been listed as one of the assets of the estate of Virtus F. McConkie, deceased. The trial court was clearly right in declaring the defendant J. Archie McConkie a trustee of the LaPoint lands for the use and benefit of the heirs of Virtus F. McConkie, deceased, and in requiring him and his brother and partner William H. McConkie to account.

2. The assignment by the heirs in 1922 was based upon and secured by fraudulent representation, and that the decree of the court in 1924 did not have the effect of distributing the LaPoint property to the respondents' mother.

3. The plaintiff is not barred from recovery because of the Statute of Limitations or laches.

4. Plaintiff's action in equity and her showing of extrinsic fraud practiced in the probate proceeding justified the interference of the court.

5. The lower court should have impressed a trust upon the 300 shares of the capital stock of the Whiterocks Irrigation Company which represented the water used for the irrigation of the LaPoint property.

Respectfully submitted,

CLYDE S. JOHNSON and
THERALD N. JENSEN
Attorneys for Respondent